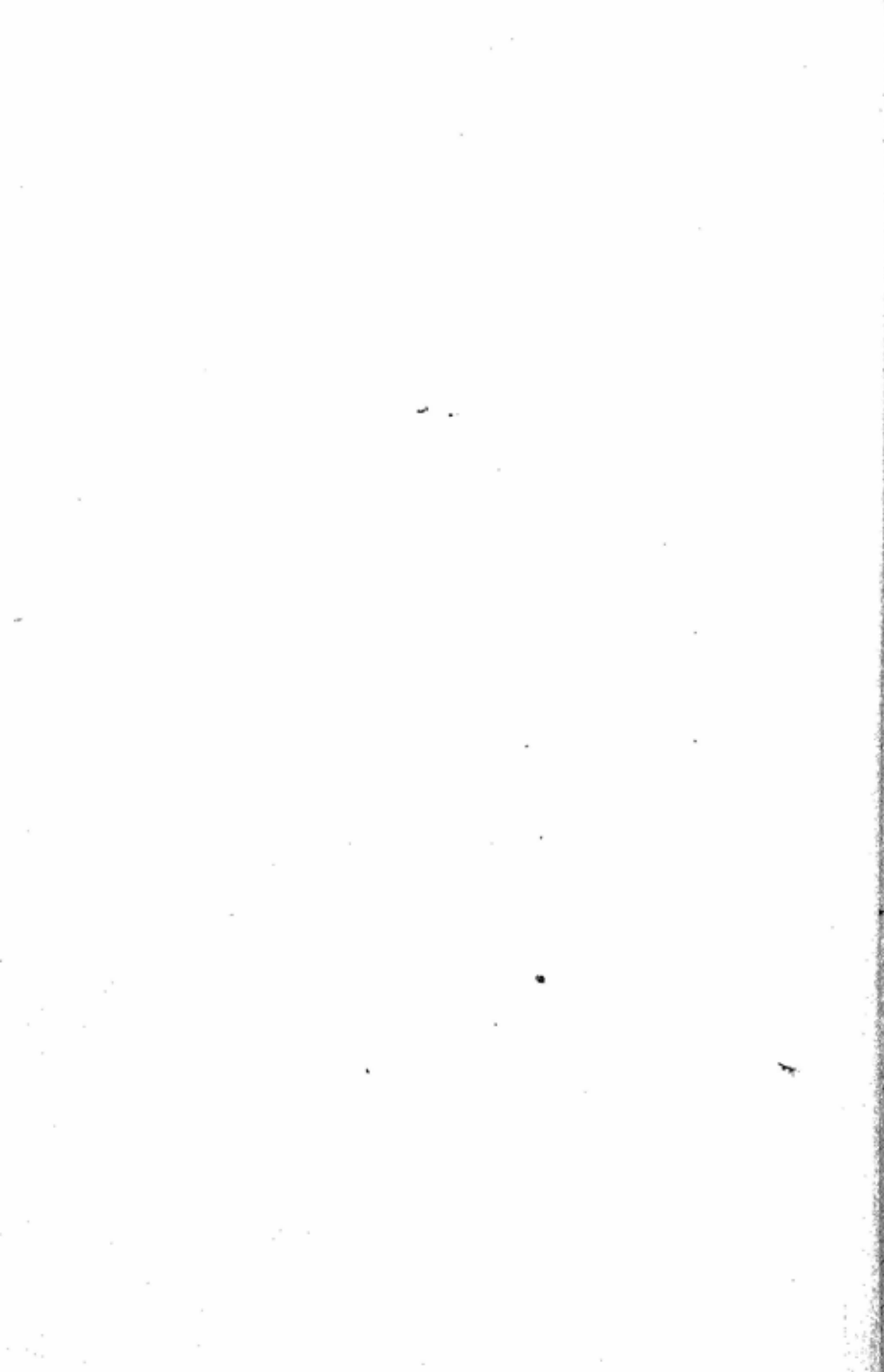


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HINDU WOMAN'S RIGHT TO PROPERTY
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HINDU WOMAN'S RIGHT TO PROPERTY

(Past and Present)

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by

ROOP L. CHAUDHARY, LL.M. (LOND.)

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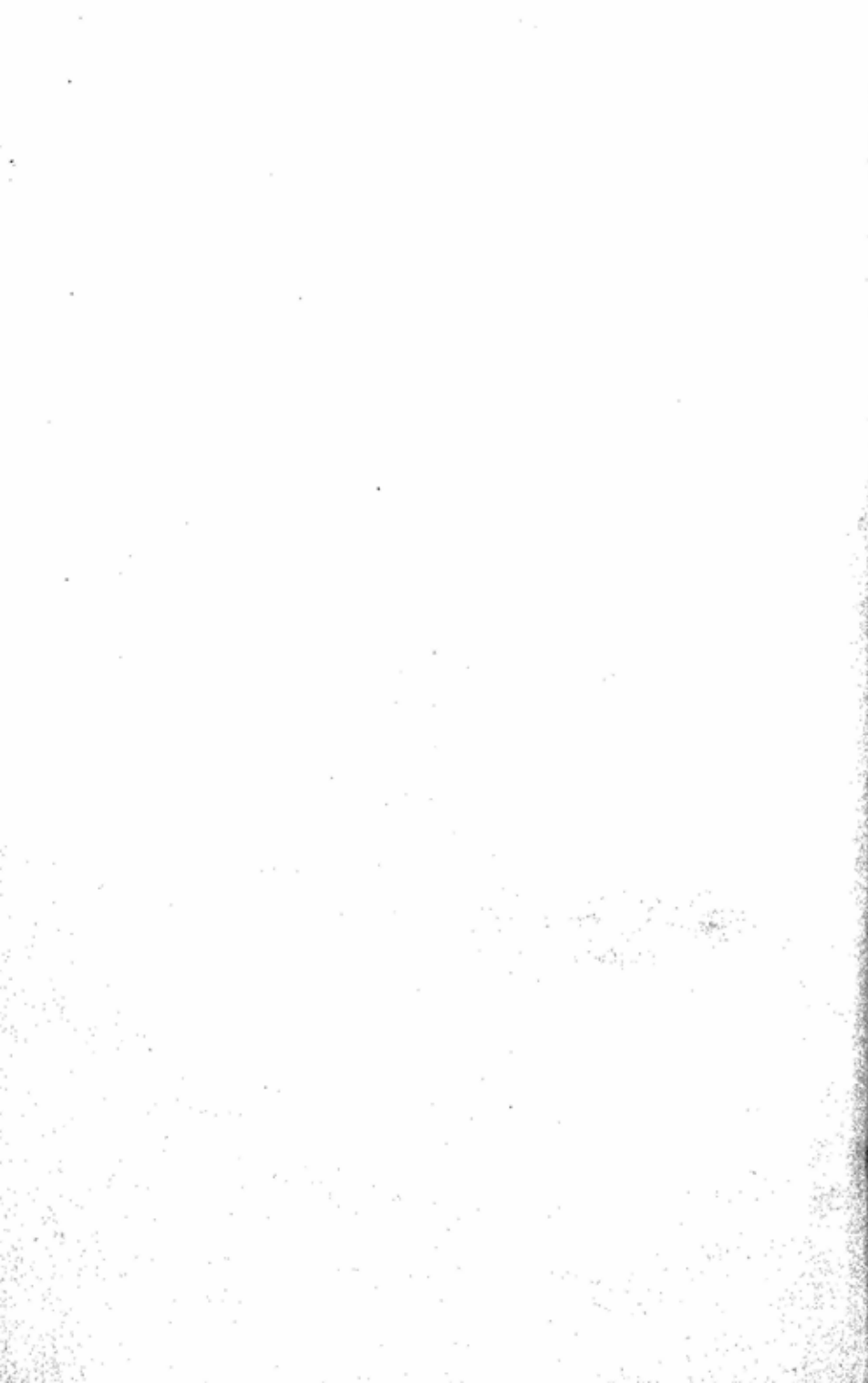
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TO
DR. J. DUNCAN M. DERRETT,
Reader in Oriental Laws, University of London.



PREFACE

This book is an attempt to show not only what were the limited proprietary rights of a woman to alienate or to surrender the estate inherited by her from her husband in Hindu law, but also how they came to be what they are.

Codifying Hindu law in gradual stages, the Legislature passed the Hindu Succession Act in 1956. The measure, specially its provisions conferring extensive rights of heirship on females, evoked considerable criticism in the country. The more influential Hindu opinion has had, however, its way. But it remains to be seen how far the average Hindu in villages will permit these rules of succession to operate and will not attempt to dispose of his property by will. It is believed that the Act will have far-reaching effects on the structure of Hindu society as it stands now.

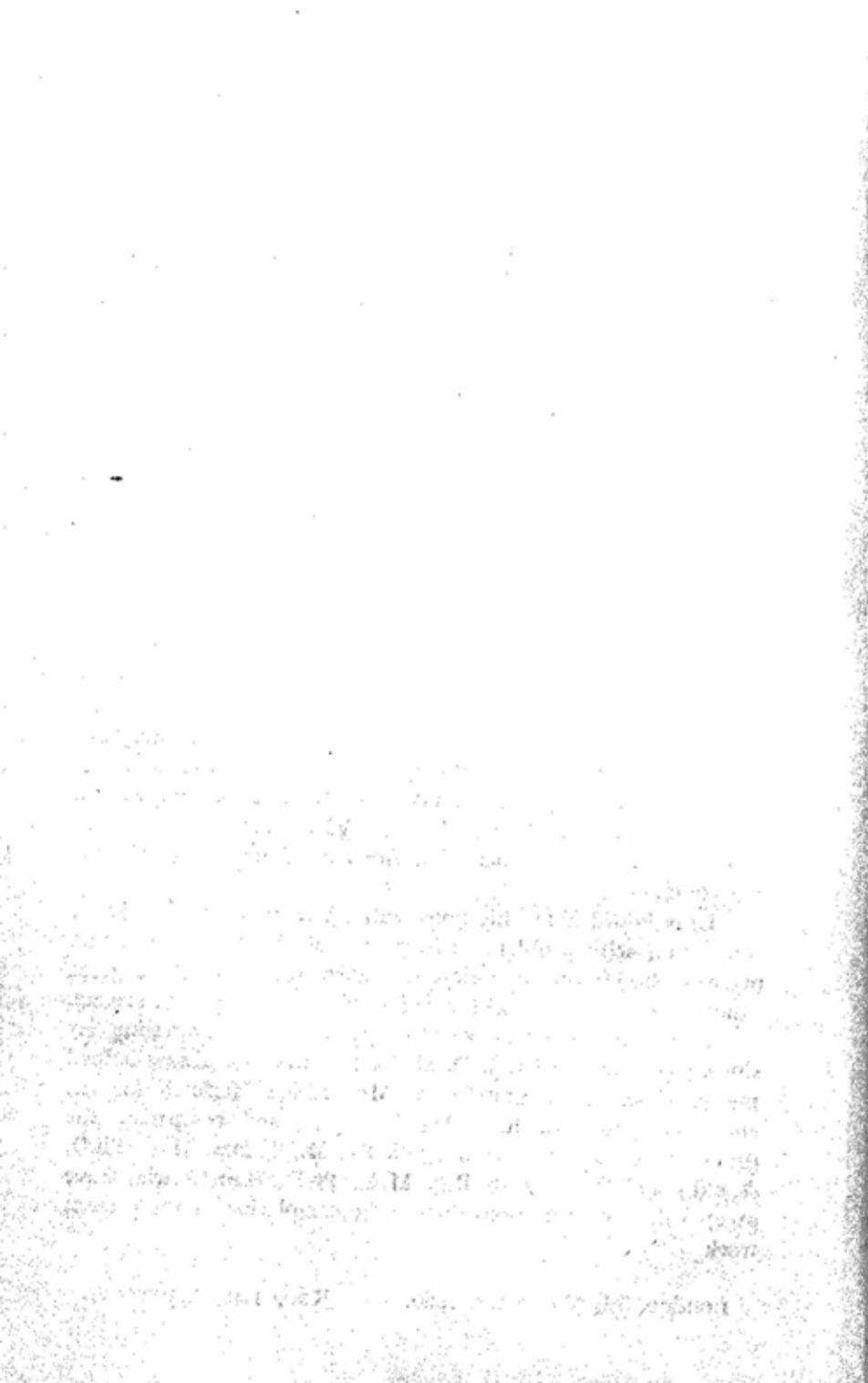
Chapter I is devoted to showing the position of women in general and particularly her proprietary rights. Chapter II deals with the origin of the Hindu woman's limited rights. In Chapter III her rights to alienate the inherited property are shown and Chapter IV dwells upon her right to surrender. In Chapter V the rights of the reversioners in connection with a woman's estate are stated. Chapter VI discusses the woman's estate and the Hindu Succession Act and Chapter VII contains the conclusion.

It is hoped that this book will prove useful not only in connection with problems arising out of the law as it stood prior to the Hindu Succession Act, 1956, but also with a great number of cases which will arise out of the terms of that statute.

It is a pleasure to have this opportunity of expressing my sincere gratitude to Dr. J. D. M. Derrett who has always helped me in time. I am grateful to Miss Helga Herforth for the enormous pains she has taken in typing and comparing the proofs of this book. I also thank Dr. M. N. Das, M.A., Ph.D. (Lond.) and Dr. Jagdish Raj, M.A., Ph.D. (Lond.) who have given valuable suggestions during the completion of the present work.

London, 5th November, 1960.

ROOF LAL CHAUDHARY.



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CHAPTER I

INTRODUCTION

VEDIC STUDY AND LEGAL STATUS

✓The majority of authorities on Hindu Law, Indian and European alike, believed that women were in very ancient times regarded merely as chattels¹, that they could be bought and sold and that they were treated as inferior to males and in some respect comparable with slaves; that they were incapable of holding property, and that gradually both their status and proprietary position were elevated—a process which may be observed in the later Smṛiti-writers and the commentators. In fact according to the prevailing *śāstric* theory, the general principles followed with respect to females is that they may claim no right unless it is supported by express authority.

When we study the Smṛitis themselves we find that the status of females had considerably deteriorated and they were thought incompetent to perform sacrifices² and to read the Vedas as they could not be initiated. Manu³, for instance, says that initiation of women consisted not in a commencement of Vedic study, but in their marriage; "The nuptial ceremony is stated to be a Vedic sacrament for women and to be equal to the initiation, serving the husband equivalent to the residence in the house of the teacher, and the household duties the same as the daily worship of the sacred fire." In another verse Manu makes the position clear. The sage says, "For women no sacramental right is performed with sacred texts, thus the law is settled; women who are destitute of strength and destitute of the knowledge of Vedic texts, are impure as falsehood itself, that is a fixed rule." In Jagannatha's opinion⁴, this text indicates the exclusion of women from the study of the Vedas; from this cause (*viz.*, exclusion from the study of the Vedas) though physically existent, they are normally non-existent or false beings.

This lack of capacity of females to read the Vedas and sacred texts or *śāstras* generally must have affected their status in actual as well as formal ways. It was made the basis

on which the dependent condition of women was made to rest. In the *Narada Smṛiti*^a which is the first to treat exclusively of law in the strict sense, the following text occurs: "It is through independence that women go to ruin, though born in a noble family. Therefore the Lord of Creatures has assigned a dependent condition to them." This furnishes the test of legal status. All the texts of the different sages about the perpetual tutelage of women which we quote presently are based on the incompetency of women to study the Vedic lore.

(EFFECT OF CASTE ON ONE'S STATUS IN HINDU LAW)

This is the proper place to show another test of status in Hindu law. In the Jurisprudence of the United Kingdom, for example, modern private law places all persons irrespective of their birth or order on the same footing in respect of legal rights or duties. It takes no account of incapacities unless the weakness is so marked as to fall into certain well-known exceptions such as infancy or idiocy. We may compare the continental concept of 'Prodigality'. It makes no distinction between men or women in enjoying rights and enforcing duties accordingly as they belong to a superior or an inferior class in the social scale. As is well known, the present position is the result of a century of evolution.⁷ But it is otherwise with the Hindu law under which every individual has ascribed to him or her, at his or her birth, the state or condition relative not merely to gender, but also to a particular caste and as such, subject to the rights and obligations peculiar to the members of that caste. The caste to which a person belongs influences his or her legal position. No one can read the texts of the sages without being impressed by the influence of caste on the material character of Hindu law. Inferiority of status by virtue of caste must always have been taken for granted in ancient India. (One may notice here that there is a common feature which underlines all the *Dharma Shastras*, i.e., a tendency to reduce women of the three regenerate classes to the level of *Sudras* (the lowest Arya caste) in respect of legal rights and duties. The *Sudras*—and all females—have no initiation or regenerating ceremony; the 'initiation' of both (so to speak) consists in their marriage. It seems that the incapacities of women (whatever their caste) were thought explicable in terms

of a caste disability. The historical sequence of ideas is, however, obscure for want of adequate evidence.

SANSKRIT AUTHORITIES REGARDING DEPENDENCE

In prescribing the duties of women Manu says, "By a girl, by a young woman, or even by an aged one nothing must be done independently even in her own house."⁸ In the next verse the sage observes, "In childhood a female must be subject to her father, in youth to her husband, when lord is dead to her sons; a woman must never be independent."⁹ Again, in chapter IX, which deals with the eternal laws for husband and wife who keep to path of duty whether they are united or separate, Manu says, "Her father protects her in childhood, her husband protects her in youth and her sons protect her in old age; a woman is never fit for independence."¹⁰

The next sage of importance and authority is Yajnavalkya. "The father", observes Yajnavalkya, "should protect the maiden daughter, the husband when she is married, the sons in her old age; in their absence their clansmen. A woman has no independence at any time."¹¹

Narada whose judicial theories, as a rule, indicate a decidedly advanced stage of development as compared to Manu and whose works have been proved to be later than the Institutes of Yajnavalkya reproduces almost exactly the text of Manu about dependence.¹² Again the same authority tells us, "Wives, slaves and other attendants are dependent".¹³

The author of the *Dayabhaga* after stating that the widow is entitled to inherit her husband's estate maintains that in the disposal of property by gift or otherwise, she is subject to the control of her husband's family, after his decease and in default of sons, and in support of this view he cites the two texts of Narada referred to above.

It may be concluded from the aforesaid texts that the conditions of women during the period of the Smritis was one of dependence. The main object of the above-mentioned texts may have been to preserve the morals of females as they lacked capacity to distinguish between right and wrong, since they were prohibited education in the sacred scriptures. It must be borne in mind that girls were normally married at an age between 8 and 12 years, and the life of a child-bride did

not encourage sturdy and healthy independence of character. Thus the theory of perpetual tutelage of women had not actually *deprived* them of their proprietary right, though it imposed certain limits, which are dealt with in this book within the limits proposed in the title.

Dr. A. S. Altekar says, "The fact, however, was that the doctrine of perpetual dependence of women was never seriously subscribed to by Hindu society, though some of its jurists had solemnly initiated it. Proprietary rights of women went on developing in spite of the doctrine. [The only result of material consequence which it produced was to circumscribe women's power to dispose of immoveable property. It has to be noted, however, that the rights of males also were by no means unrestricted in this matter."¹⁴]

✓ The topic of this book is of great importance, because of proprietary position of females in any civilisation has arrived. Law is one of the agencies by which the life of a nation is developed and the proprietary position of females in Hindu law furnishes a relevant test of the Hindu civilisation. Law is the result of social and economic forces and cannot be studied in isolation from these forces. The proprietary position of women in any system of law represents the thought and feeling of the community with regard to them at the time when the law itself was made or evolved. Sir Henry Maine says, "The degree in which personal immunity and proprietary capacities of women are recognized in a particular state or community is the test of the degree of the advance of its civilisation; and though the assertion is sometimes made to give it value, it is very far indeed from being a mere gallant commonplace. For inasmuch as no class of similar importance and extent was, in the infancy of society, placed in a position of such absolute dependence as the other sex, the degree in which the dependence has voluntarily been modified and relaxed serves undoubtedly as a rough measure of tribal, social and national capacity for self-control... The assertion then, that there is a relation between civilisation and the proprietary capacities of women is only a form of the truth and every one of those conquests, the sum of which we call civilisation, is the result of curbing some one of the strongest because of the primary impulses of human nature."¹⁵ The proprietary position which women

occupy in Hindu law is not only an index of Hindu civilisation but is also a correct criterion of the culture of the Hindu race.

NOTES

- ¹ Mayne on Hindu Law, 6th Edition, p. 86.
- ² Manu IV, 205, 206.
- ³ Manu II, 67.
- ⁴ Manu IX, 18.
- ⁵ Colebrooke's Digest, Vol. II, p. 506.
- ⁶ Narada XIII, 30.
- ⁷ Graveson, R. H. and Crane, F. : *A Century of Family Law*, 1857-1957, London, 1957.
- ⁸ Manu V, 147.
- ⁹ Manu V, 148.
- ¹⁰ Manu IX, 3.
- ¹¹ Institutes of Yajnavalkya, I, V, 85.
- ¹² Narada IV, 2.
- ¹³ Narada I, 34.
- ¹⁴ Altekar, A. S. : *The Position of Women in Hindu Civilisation*, 2nd Edition, p. 331 ; the restrictions upon males were the natural result of co-ownership, and there is no proper analogy there.
- ¹⁵ *Early History of Institutions*, p. 339.

CHAPTER II

ORIGINS OF THE LIMITED ESTATE IN HINDU LAW

The topic of the "women's limited estate" is a subject of great controversy. In the following pages an attempt will be made to observe the nature and the sources of the restricted proprietary rights of a widow in the property inherited by her, because the same conditions formerly applied to the estate of other females generally excepting the estate taken by a sister or a daughter in the former Presidency of Bombay.

The basic source of law on the subject appears in the original Sanskrit text books. With regard to the proprietary right of a woman over the property which she has acquired by inheritance we may refer to Manu, Vishnu and Yajnavalkya as paramount authorities.

MANU

Manu enumerates six kinds of woman's property, "What was given before the nuptial fire, what is given on a bridal procession, what is given in token of love, and what was received from her brother, mother or father that is called the six-fold property of a woman."¹

Again Manu says, "There are seven lawful modes of acquiring property, (*viz.*) inheritance, finding or friendly donation, purchase, conquest, lending at interest the performance of work, and acceptance of gifts from virtuous men."²

To these six kinds of woman's property mentioned by Manu, Vishnu adds gifts by sons, the present on supersession, the wife's fee (*sulka*) and the gifts subsequently.³

YAJNAVALKYA

The text of Yajnavalkya is, "What was given to a woman by the father, mother, her husband or her brother, or received by her at the nuptial fire or presented on her supersession (*adhivedanika*) and the like (*ada*), is denominated woman's property."⁴

Of all the commentators the author of the *Mitakshara* has been the most favourable towards woman's proprietary rights.

He supports his theory by the text of Yajnavalkya to which he gives the widest signification. Commenting on this text he says, "That, which was given by the father, by the mother, by the husband, or by a brother, and that, which was presented to the bride by the maternal uncles and the rest at the time of the wedding, before the nuptial fire, and a gift on second marriage, or gratuity on account of supersession, as will be subsequently explained (to a woman whose husband marries a second wife let him give an equal sum as compensation for the supersession), and also property which she may have acquired by inheritance, purchase, partition, seizure or finding, are denominated by Manu and the rest "Woman's property".⁵

P. V. KANE

Dr. P. V. Kane expressed his views on the subject under discussion as follows: "Yajnavalkya and Vishnu among Smriti writers were probably the first to clearly enunciate the rule that the wife was the foremost heir of a man dying without male issue." Brihaspati makes the wife first heir of a sonless man and supports his opinion with reasons. He says: "In the Veda and in the doctrines of the Smritis and in popular usage the wife is declared to be half the body of the husband, equally sharing the consequences of good and evil acts. Of him whose wife is not dead half the body survives. How can another obtain the property, while half the body of the deceased lives? Although kinsmen, although his father, mother or his relatives may be alive, the wife of a man dying without issue succeeds to his share. A wife dying before her husband takes away his sacred fires (i.e., she is cremated with sacred Vedic fires, if he is an *Agnihotrin*) but when the husband dies before the wife, she takes his property, if she be chaste."⁶

From the above-mentioned observations the following rules may be deduced: firstly, that an acquisition by inheritance produces a proprietary right and secondly, according to the *Mitakshara* school a female acquires an absolute interest in the property inherited by her from her husband.

BRIHASPATI

The text of Brihaspati (already mentioned) which declares that a woman is not the surviving half of her husband and

the text of Manu, "The widow of a childless man keeping unsullied her husband's bed and preserving in religious observances shall present his funeral oblation and obtain his entire share",⁸ do not seem to impose any restriction on the rights of a widow. We may say that so far as those Smriti authorities are concerned, they do not seem to have insisted upon the qualified estate of women in the property inherited by them.

KATYAYANA AND NARADA

But the texts of Katyayana and Narada are said to disprove the absolute right of a widow in inherited property. In Narada we find the author saying: "Women are not entitled to make a gift or sale, a woman can only take a life-interest, whilst she is living together with the rest of the family. Such transactions of women are valid, when the husband has given his consent or in default of the husband, the son, or in default of husband and son, the king. She may enjoy or give away goods according to her pleasure except immoveables, for she has no proprietary rights over the fields and the like."⁹

Commenting on this verse of Narada Dr. D. N. Mitter says: "With regard to the texts of Narada it is clear that it is stated so broadly that it cannot really represent the true view of the law. His verse would apply even to *stridhan* over which women have undoubtedly absolute right of disposition. Besides they are not cited by any commentator, not even by the *Dayabhaga*, in support of theory which curtails the rights of women in inherited property."¹⁰

It will be recollected that even in respect of *stridhan*, if *asaudayika*, a woman's powers of alienation are not absolute, but the limitation is of a very mild sort when compared with that of the limited estate, as it does not apply to a widow in any case. Moreover it is to be noted that verses 28 and 30 are missing from the text of Narada as given in the ancient commentary of Bhavasvami on the *Nai-diyamanusamhita*, the remaining *slokas* giving the impression that the widow's title is absolute but her alienations require the participation of a male tutor for their validity in practice.

Again, Katyayana says, "Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable

protector, enjoy with moderation property until her death. After her let the heirs take it."¹¹ From this passage a special rule relative to the succession and proprietary rights of a widow can be deduced, *viz.*, that the childless widow is to maintain her chastity. Further analysing the whole passage we may assert firstly that the words "abiding with her venerable protector" serve merely as a moral restraint upon her behaviour. Secondly, the words "enjoy with moderation the property until her death" show that she should be moderate in her meals and refrain from luxuries during her lifetime. This accords with the traditional Hindu picture of the pious and devoted widow. Lastly, the words "After her let the heirs take it", indicate that the property left by her at her death shall devolve on her heirs, because the word "heirs" refers to the subject, *i.e.*, the widow herself.¹²

MITAKSHARA

So far as the *Mitakshara* is concerned it is observed that it never intended women to possess only a life interest in the property which they obtain by inheritance or partition. It does not distinguish the right of males from the right of females over such inherited property. It declares then all heirs to the deceased owner indifferently. In the *Mitakshara*¹³ the right of a widow to succeed to the entire estate of her husband in default of a male offspring is supported *inter alia* by reference to the male that she is entitled to receive a share equal to a son even at the partition which takes place either during the lifetime of the husband or after it whether or not her maintenance requires such a proceeding. This affords also a strong reason to show why a mother is entitled to inherit her son's property on failure of his nearest heirs.

MAHABHARATA

A text from the *Mahabharata*, *viz.* : "For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth."¹⁴ With the gloss of *Vivada Chintamani* that waste means, "sale and gift at their own choice" and has also been relied on in support of the doctrine of the qualified right of the widow in the property inherited by her from her husband.

DAYABHAGA

Jimutavahana, the author of the *Dayabhaga* says : "But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage or sale of it." Thus, Katyayana says, "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it."¹⁵ He continues, "In like manner, if the succession have devolved on a daughter, those persons, who would have been heirs of her father's property in her default take the succession on her death, not the heirs of the daughter's property."¹⁶

After declaring that if a maiden daughter in whom the succession has vested, and who has afterwards married, die without issue, the estate does not go to her husband or other heirs, since that rule of succession is applicable to a woman's peculiar property. He goes on to say, "Since it has been shown by a text before cited that on the decease of the widow in whom the succession had vested, the legal heirs of the former owner, who would regularly inherit his property, if there were no widow in whom the succession vested, namely, the daughters and the rest, succeed to the wealth, therefore the same rule (concerning the succession of the former possessor's next heirs) is inferred *a fortiori* in the case of the daughter and grandson, whose pretensions are inferior to the wife's."¹⁷ Then he further observes: "Or the word wife is employed with a general importance and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance."¹⁸ From the discussion in the *Dayabhaga* as to what constitutes *stridhana*, it is absolutely clear that though the author does not admit any definite limit as to the number of kinds of *stridhana*, yet the only kinds of property that he has expressly considered to be *stridhana* are those obtained from relations by gift and there is not the slightest indication that inherited property in the other's opinion would rank as *stridhana*. When dealing with the daughter's succession to the father's property, the author says that the principle laid down in the case of a widow that on her death the inheritance passes to the next heir of the last full owner (the husband) is applicable generally to the case of a woman's succession by

inheritance. It is true that this is said in a chapter of the work relating to succession. Under such circumstances, according to the *Dayabhaga* school, a widow is not allowed to alienate property inherited by her from her husband at pleasure like her *stridhana*. As regards the exceptional occasions which justify its alienation they are generally believed to be alienations for religious purposes or in cases of necessity, i.e., if the widow is unable to subsist otherwise.¹⁹

DAYAKRAMA SANGRAHA OF SRIKRISHNA TARKALANKARA

The *Dayakrama Sangraha* of Srikrishna Tarkalankara which is the next authority in point of importance in the Bengal school, follows in the main the doctrines of the *Dayabhaga*. Srikrishna says that heritable wealth does not form a woman's peculiar property.²⁰

Dealing with succession to the separate property of a woman when received by her at her nuptials which is the description of *stridhana* he observes: "Here, however, on the death of a maiden daughter or of one affianced in whom the succession had vested, and who having been subsequently married is ascertained to have been barren, or on the death of a widow who has not given birth to a son, the succession to the property which has passed from the mother to her daughters would devolve next on the sisters having and likely to have male issue, and in their default on the barren and widowed daughters, and not on the husband of such daughter above mentioned in whom the succession had vested, for the right of the husband is in relation to the 'woman's separate property', and wealth has in this way passed from one to another, can no longer be considered as the 'woman's separate property'. This must be understood."²¹

It is apparent from the aforesaid observation that on the death of a daughter who inherited her mother's *stridhana*, the property passes not to her heirs but to the next heirs of her mother.

It may be argued that the use of the words "ascertained to have been barren", and "who has not given birth to a son", in the above mentioned passage indicates that the other heirs of the mother can come in only if the daughter who succeeded first dies leaving no male issue.

With respect to the *Dayabhaga* we may say that if there are some texts cited in it tending to permit a woman only to enjoy during her life the property which she acquires by inheritance, and also to prohibit her from making any disposition of it, there are like prohibitory texts to be met with in the case of a male owner too. In the *Mitakshara* it is declared that, "The father is master of the gems, pearls and corals and of all other moveable property, but neither the father nor the grandfather is so of the whole immoveable property."²² Again, in the same authority the concluding part of the verse quotes a text: "They, who are born, and they who are yet unborn, and they who are still in the womb require the means of support, no gift or sale should, therefore, be made."²³

SIR THOMAS STRANGE

Sir Thomas Strange points out the distinctions between the Bengal law and that of South India in this respect, "Had the property been the mother's in the Hindu sense of woman's property, it would descend on her death to her daughters, but having been inherited by her from her son, it passes, according to the law as practised in Bengal, not to her heirs, but to his, which on failure of issue of the proprietor, male and female of his widow and parents, is his brother or brothers; those of the whole being preferred to those of the half-bloods, those of the half succeeding only on failure or in default of those of the whole. According to the *Mitakshara* which is followed in this respect by other authorities in Southern India so vested, it classes as *stridhana* and descends accordingly under rules of inheritance for property of that description to her daughters and not to her sons; but according to the doctrine of *Smriti-Chandrika* the right of inheritance is vested in different persons, as it was acquired before or after coverture."²⁴

JAGANNATHA

In the digest of Jagannatha no allusion whatever is made to the doctrine of the *Mitakshara*, nor among the multitudes of other authorities quoted in this passage of the *Mitakshara* even so much as referred to.²⁵

SMṚITI-CHANDRIKA

The author of the *Smṛiti-Chandrika*, who certainly studied the *Dayabhaga*, though he cites the text of Yajñavalkya, does not give it the wide significance which the *Mitākshara* gives. On the other hand, there occurs a passage in that treatise which suggests by implication that inherited property is not *stridhana*. That passage is as follows, "Whatever the mother takes she takes for herself like the *stridhana* called *Adhyagni* and the like and not for the benefit of both herself and her husband."²⁷ The *Adhyagni* is that which is given to a woman at the time of her marriage near the nuptial fire and descends according to the author of the *Smṛiti-Chandrika* to daughters unmarried and unprovided having the preference and on failure of daughters to their issue, the female issue, however, taking before the male. According to the said treatise the power of a widow to alienate her husband's inheritance is absolutely restricted to gifts for charitable purposes and she is enjoined to endure patiently any opposition offered by the husband's heirs to the application of the wealth left by him. Of *Saudayika*, the *Smṛiti-Chandrika* takes a far more narrow view than all other works, restricting it as it does entirely to nuptial presents received from her father's family.²⁸ This is the point in which the special authority of *Smṛiti-Chandrika* of South India is found at variance with the *Mitākshara*, but in agreement with the Bengal School.

PARASARA MADHAVIYA

The Parasara Madhaviya permitted widows to inherit but in stating the limitations to which a woman's power over property inherited from her husband is subject it introduces the distinction between moveable and immoveable estate and attaches more importance to the nature of the estate than to the particular purpose for which it is alienated. In fact so far as the immoveable estate is concerned, an alienation for any purpose is not allowed under the Madhaviya except with the concurrence of male co-heirs.²⁹

SARASVATIVILASA

The *Sarasvativilasa* does not lay down the extent of a widow's power over her estate, and so far as its ruling on

stridhana is concerned it is often not clear whether *stridhana* proper or the entire property of a woman is meant. It calls *Saudayika* all gifts received from loving relations at any time, but it states also with equal generality that a female shall have no independent power over them if they consist of immovables.²⁰

VYAVAHARA MAYUKHA

Nilakantha, the author of the *Vyavahara Mayukha* has allowed the widow to alienate property inherited from her husband for any religious or charitable purpose, though not otherwise. A text of Katyayana, prohibiting the gift, sale or mortgage by a widow of property inherited from her husband is explained away by Nilakantha as referring merely to prohibited gifts to unworthy persons.²¹

VIRAMITRODAYA

Mitra Misra, the author of the *Viramitrodaya*, actually says, "Therefore, it is established that in making gifts or mortgages for the purposes of performing what is necessary in a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband; the restriction, however, is intended to prohibit gifts to players, dancers and the like as well as sale or mortgage without necessity."²²

DR. J. JOLLY

The *Viramitrodaya* seems to agree to a great extent very closely with the *Vyavahara Mayukha*. But Dr. J. Jolly observes, "Mitramisra is especially explicit about a widow's right over her estate which he discusses in the Chapter on Obstructed Heritage. There, in attacking the narrow views of Jimutavahana on this subject, he goes the length of asserting that the Bengal theory of *factum valet* is quite as applicable to women as to men."²³

It is to be noted, with great respect to that scholar's learning, the different appraisals of Mitra Misra's intention are possible, as a persual of his analysis of the author's rules, in the next paragraph to that cited above, shows.

Having gathered all the available information, Dr. J.

Jolly expressed his views in favour of the *Mitakshara* doctrine in respect of a woman's inherited estate. Furthermore, he mentions the opinions of Kamalakara, Ballambhatta, Nanda Pandita, Viśveswara in his *Subodhini*, the *Saraswati-Vilasa* and Apararka.²⁴

KAMALAKARA

Talking about Kamalakara Dr. J. Jolly points out, "Thus Kamalakara, in the *Vivadaṇḍava*, section on *stridhana*, after quoting Yajñavalkya's definition of *stridhana*, adds just as Viṇṇaneswara, as indicated by the use of the word *Adi*, acquisitions made by inheritance, purchase, acceptance and so on, are also included in this definition."²⁵

BALAMBHATTA

"Balambhatta (Laskmidevi)", Dr. J. Jolly says, "mentions and censures expressly the reading of the Eastern Lawyers, Chaiva for Adyah, in the text of Yajñavalkya. He says that the expletive particle *Eva* substituted for *Adya* by those authors make no sense."²⁶

NANDA PANDITA

He continues, "Nandapandita, in the *Vaijayanti*, expressly includes all other acquisitions of a woman in the term *stridhana* and what is particularly interesting, he deduced his doctrine not from the text of Yajñavalkya but from Vishnu's definition of *stridhana*. That definition, as has been seen above, agrees almost word by word with Yajñavalkya's, but instead of ending with *Adya*, it terminates with the expletive particle *Iti*, meaning (if perforce to be translated) 'thus has *stridhana* been described'. Nandapandita, however, after having explained the foregoing part of the *Sutra*, remarks on the meaning of *Iti* as follows: As indicated by the word *Iti*, property received during the bridal procession and property obtained by inheritance, purchase, partition, acceptance, finding as maintenance, in the shape of ornaments or of gifts etc. has also to be included. All these species of property together should be known to be *stridhana*. For Gautama²⁷ says: 'A man becomes owner by inheritance, purchase, partition, seizure or finding, etc.' The attempt to impart such a wide meaning as

this to an insignificant particle like *Iti* can hardly be accounted for except on the supposition that Nandapandita, in due deference to the author of the *Mitakshara* on which he had compiled a learned commentary previous to writing the *Vaijantī*, felt bound to impart exactly the same meaning to the text of Vishnu as that assigned to the text of Yajnavalkya by Vijnaneswara."²⁸

VISVESVARA

Further commenting on the subject, Dr. J. Jolly points out, "Another commentator on the *Mitakshara*, Visvesvara says in the *Madanaparijata*, after quoting the text of Yajnavalkya on *stridhana*, 'The word *Adya* refers to property acquired by spinning (*Kartana*), purchase, partition, seizure, finding a treasure and other modes of acquisition'. The fact that Visvesvara here speaks of spinning (*Kartana*) instead of inheritance (*Riktha*) might seem to constitute an important difference between his doctrine and the teaching of Vijnanesvara. However, the reading *Kartana*, though found in two MSS. from Colebrooke's collection, and one MS. from Dr. Buhler's collection, can only be due to an oversight on the part of a copyist, as Visvesvara must have derived his opinion on the subject from the *Mitakshara*, which, no doubt, contained the reading (*Riktha*) inheritance. In his Commentary on the *Mitakshara*, the *Subodhini*, Visvesvara implicitly followed Vijnaneswara."²⁹

SARASVATIVILASA

Stating the views of the *Sarasvativilasa*, Dr. J. Jolly said, "One Madras authority also assents unreservedly to the doctrine of the *Mitakshara*. The *Sarasvativilasa*, which has now been printed, after quoting the text of Yajnavalkya, repeats word for word the clause of the *Mitakshara* regarding the term *Adya*. It is true that, in some passages of his work, Rudradeva uses the term *stridhana* in reference to the separate property of woman only. On the other hand, he takes a very friendly attitude towards the proprietary rights of women, which is exhibited, e.g., by the fact that he treats *stridhana* by the side of the succession to males, as obstructed property."³⁰

APARARKA

Lastly with regard to Apararka's view on the subject he observes, "However, Vijnaneswara's theory does not receive more striking confirmation from any other quarter than from Apararka's Commentary on the *Yajnavalkya-Smriti*. Apararka had that identical reading *Chaiva* in the text of *Yajnavalkya* before him which caused Jimutavahana to put forth his restrictive definition of the term *Stridhana*. Nevertheless, what Apararka says about the meaning of this reading is this: 'The particle *cha* has the same meaning as *Adi* etc. Therefore, it is used in order to include other species of *stridhana* such as are mentioned in the following texts: The wives shall obtain an equal share⁴¹; the mother also shall receive an equal share⁴²; the fourth part of their own share⁴³ let the daughters divide the nuptial present of their mother⁴⁴; this and whatever else may become the property of a woman is denominated woman's property, by Manu and other ancient sages.' These remarks prove that Apararka, though he has followed a different reading managed to arrive at the same conclusion as Vijnaneswara by a different process of reasoning. What is particularly important, he expressly includes in the term *Stridhana* all property obtained by partition or inheritance by a woman whether in her maidenhood, during conventure, or as a widow. It should also be mentioned that Apararka, in commenting on the context of *Katyayana* regarding the maximum amount of donations of *Stridhana*, says it relates to donations made in the course of one year. This wide interpretation, which has been adopted by most other Commentators, tends to illustrate the prevailing tendency to extend the original sphere of *stridhana* property."⁴⁵

It is to be noted that, except for an alleged following in Kashmir, the excellent text book of Apararka has been totally neglected by the courts in the British period.

H. H. WILSON

Considering the subject under discussion Professor H. H. Wilson points out, "The spirit and the text of the original law, in our estimation, recognise the widow's absolute right over property inherited from a husband, in default of male issue. In Bengal the authorities that are universally received

have altered this law and restrict a widow to the usufruct of her husband's property. They have not, however, provided for its security, nor for its recovery if alienated, and by such neglect have virtually left the law as they found it, or the power if not the right of alienation with the widow; it is open to the court, therefore, to make what regulations on this subject they please, as far as their jurisdiction extends, and as far as they are authorised by the Charter; and the regulation, most conformable to reason, to analogy, and the spirit of the Hindu Code, would be to give the widow absolute power over personal property, and restrict her from the alienation of the estate except with the concurrence of her husband's heirs."⁴⁶

He continues, "It is absurd to say that a woman was not intended to be a free agent, because the old Hindu legislators have indulged in general declarations of her unfitness for that character. Manu, it is true, says of women, 'Their father protect them in childhood, their husbands protect them in youth, their sons protect them in age. A woman is never fit for independence.'⁴⁷ But what does this prove in respect to their civil rights? Narada goes farther and asserts that 'after a husband's decease the nearest kinsmen should control a widow, who has no sons, in expenditure and conduct'.⁴⁸ But as we have observed this is neither the law nor the practice of the present day."⁴⁹

We may say with great respect for that scholar's learning, that he made the above mentioned observation in 1835, while the Anglo-Hindu legal tradition was hardly yet established.

JUDICIAL OPINION

In order to become familiar with judicial opinion on the point under discussion we will have to go through a series of cases. In the case of *Radhachurn Rai v. Kishenchund Rai*⁵⁰ it was laid down that according to the exposition of the Hindu law as received in Bengal, the widow has a right to her husband's share for life, even though the family be undivided. Again in *Mahadu v. Kuleani* where a widow succeeded to the landed property of her husband, it was observed that she takes only a life interest in such property. In other words, the widow has not a complete proprietary right, neither can she in strictness be called even a tenant for life, because the law

provides her successors and confines her use of the property to very narrow limits. She cannot alienate the smallest part except for necessary purposes and certain other objects particularly specified. Thus she can be considered in no other light than as a holder in trust for certain uses.⁵¹

In *Cassinauth v. Hurrosoondery*⁵², East C. J. pointed out, "I can find no better way than to consider her as having the entire right of property vested in her, both in the moveable and immoveable estate; for there is no distinction between them taken in the books in respect of the husband's estate devolving upon her as heir, as there is in the case of male succession to ancestral property, and there is, also, in respect of real property given to her by her husband in his lifetime, which she is declared incapable of alienating from his heirs, as she may, alien the personal property so given. But she is legally prohibited from wasting the property so vested in her and cannot make away with it except for certain allowable and declared purposes, without the consent of her husband's next male heir."

In *Keerut Sing v. Koolahal Singh*⁵³ this question was again considered where their Lordships of the Privy Council laid down that a widow, in default of issue, is entitled to succeed to the whole of her deceased husband's estate, but her title to such estate is only as tenant for life, and she has no power to alienate or devise any portion of the estate which, on her death, devolves on his legal heirs.

In the case of the Collector of Masulipatam *v. Cavalry Venkata*⁵⁴ the Privy Council considered it "clear" that under the Hindu law the widow, though she takes as heir, takes a special and qualified estate. Their Lordships took it as "admitted on all hands" that the widow cannot of her own will alien the property except for religious and charitable purposes. The reason for the restriction on the widow's power is, in the opinion of their Lordships, not merely the protection of the material interests of her husband's relations, but the state of perpetual tutelage to which every woman is subject according to various authorities from Manu downwards. Although the case was governed by the *Mitakshara* Law, yet their lordships, it is submitted, took this view despite the fact that in the *Mitakshara* we find nothing in favour of

a distinction between the estate acquired by a male and that acquired by a female.

The Judicial Committee in the case of *Thakoor Dauhee v. Rai Baluck Ram*⁵⁵ took the same view. Their Lordships said that the texts of Narada and Katyayana must prevail amongst the unambiguous text of the *Mitakshara*. In limiting the widow's right on the authority of the texts of Narada and Katyayana, it is submitted that their Lordships ignored firstly the rules laid down in the *Mitakshara* with respect to widow's proprietary rights and secondly the principles which they laid down for the guidance of European Judges applying Hindu law in the case of the *Collector of Madura v. Moothoo Ram Ringa Sathupathi*.⁵⁶ Again in the case of *Bhagwandeem v. Myna Badee*,⁵⁷ their Lordships held that no part of the husband's estate whether moveable or immoveable becomes his widow's *stridhana*. Besides this she is not allowed to alienate the estate inherited from her husband to the prejudice of his heirs. In their reasons, their Lordships observed, "The reasons for the restrictions which the Hindu law imposes on the widow's dominion over her inheritance from her husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land. The more ancient texts importing the restriction are general."⁵⁸ In that case it was argued that according to the text of the *Mitakshara* the property acquired by the widow was regarded as her *stridhana* over which she had absolute power, but their Lordships rejected the argument by referring to the text of Katyayana.

Thus it is long since settled in British India that a widow acquires only a limited estate, the corpus and accretions, if any, pass to her husband's heirs at her death.

The position of a widow in Allahabad and Calcutta appears to be the same except in *Hukum Chand v. Sital Prasad*⁵⁹ and *Chauli v. Mt. Meghoo*⁶⁰ where it is laid down that a Jain widow is entitled to her husband's self-acquired property absolutely by special custom. Allsop J. observed, "The widow of a *Saraogi Jain Agarwal* takes an absolute interest in the self-acquired property of her husband and she

transfers it at her pleasure. The rule is so well established that it is unnecessary to prove it as a custom in every case."⁶¹

The Privy Council in *Sheo Singh Rai v. Musst Dohha*⁶² laid down that on the evidence adduced in the case that a sonless widow of a *Saraogi Agarwal* takes by custom of the sect a very much larger dominion over the estate of her husband than is conceded by Hindu law to the widows of orthodox Hindus, to the extent at least of an absolute interest in the self-acquired property of her husband.

In the case of *Bhikabhai v. Manilal*⁶³ the Bombay High Court has held that as a matter of custom a Jain widow has absolute power to deal only with self-acquired moveable property of her husband but not with self-acquired immoveable or with ancestral property.

Dealing with the subject under discussion Mr. Sripati Roy said, "When a question regarding inheritance arises between parties of the Jain sect the Court should inquire into the custom of the sect and be guided by the result of the inquiry. If the party alleging the custom succeeds in establishing the same to the satisfaction of the Court, then, whether the custom be at variance, or in accordance with Hindu law, the Court is bound to give effect to the custom."⁶⁴ In the same case the Privy Council held that although ordinary Hindu law, in the absence of proof of special customs, has usually been applied to persons of Jain sect in Bombay, yet the Jains possess the privilege of being governed by their own peculiar laws and customs when the same are by sufficient evidence capable of being ascertained and defined, and are not open to objection on grounds of public policy or otherwise."⁶⁵ (See footnote 66.)⁶⁶

All the former presidencies except Bombay have adopted it as a law that the mother and the grandmother inheriting from a son or grandson take an estate subject to the same conditions and limitations as affect the estate of a widow inheriting from her husband.⁶⁷ In the Bombay Presidency a Full Bench in the case of *Gandhi v. Bai Janab*⁶⁸ laid down that women inheriting take the estate with complete rights over it which devolves on their own heirs after their death excepting the case of a widow inheriting from her husband.

With regard to the nature of interests acquired by a daughter in the property inherited by her from her father, there is a conflict of opinions. In the Bengal School *Chatary Lal v. Channoo Lal*⁶⁶ is considered to be a leading case on the point. In the Privy Council Sir Richard Couch observed that in all the Presidencies except in Bombay the courts have taken the view that the estate inherited by a daughter from her father is similar to that of a widow inherited from her husband. In other words, she takes only a restricted and qualified estate which does not descend as *stridhana* to her heirs on her death but goes back to the heirs of her father. Furthermore, their Lordships of the Privy Council observed, "After the series of decisions which have occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on a different interpretation of old and obscure texts, and their Lordships agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions unless, indeed, it is manifestly opposed to law and reason. They do not think this rule is opposed to the spirit and principles of law of the *Mitakshara*. On the contrary it appears to them to be in accordance with them."⁶⁷ Though the case was governed by the *Mitakshara* law, the rule applied belonged in reality to the *Dayabhaga* law. The case of *Mutter Terar v. Dara Singha Teror*⁶⁸ is also in accord with the above-cited case. The Privy Council supporting this decision of the Madras High Court laid down, "No attempt has been made to distinguish this case from that of *Chotailal* except the suggestion that the decisions upon the *Mitakshara* as applicable to Benares are not decisions upon the *Mitakshara* as applicable to the Carnatic. But if there be any ground for making such a distinction, it would be favourable to the restriction of Katama's interest in her father's property. For there are two commentaries which are received as authority in the Carnatic, the *Smṛiti-Chandrika* and *Dayavibhaga* by Madhavya, neither of which follow the cited passage of the *Mitakshara* in assigning to a woman as her *stridhana* property inherited by her. Their Lordships think then that the Judges of the courts below were quite right in holding that Katama's interest ceased with her life, and that

on her death the root of the title is to be sought not in herself but in her father."⁷²

In the former Presidency of Bombay the leading case as to the rights of daughters is Devakuvarbai's case⁷³ decided on the Equity side of the Supreme Court in 1859. It was laid down in that case that the daughters obtain complete control over the estate inherited by them. In the case of Vinayek V Laksmibai⁷⁴ Sausse, C. J. of the Supreme Court of Bombay observed that the estate inherited by a sister vests in her absolutely. In order to come to this conclusion he applied the same rules as are applicable in the case of a daughter. This seems to have been an established view of the Bombay High Court at least until the ruling of the Judicial Committee in *Muttu Tever v. Dara Singha Tever*.⁷⁵ Expressing their view with regard to this decision of the Privy Council, West and Buhler say, "The heritage taken by a daughter must in future be regarded as but a life interest whether with or without the extensions recognised in the case of the widow except in cases governed by the *Vyavahara Mayukha*."⁷⁶ In the Full Bench case of *Bhagirathibai v. Kahnujirav*⁷⁷ West J., having gathered all the information available, notwithstanding the Privy Council decision, expressed his opinion that in the Presidency of Bombay the estate inherited by a daughter from her father or mother devolves on her absolutely and passes on her death to her own heirs. He continues that it might be troublesome if the *Mitakshara* should not be followed in the same way in all parts of India, but it is public recognition which makes its law for each part.

Mr. Justice Gurudas Banerjee in his *Lectures on the Hindu Law of Marriage and Stridhana*⁷⁸ after noting the rule in Bombay that a woman has been held to possess an absolute power of alienation over all property both moveable and immoveable inherited from her father or brother says, "But considering the general spirit of Hindu law as laid down in the *Mitakshara* and the *Mayukha* and bearing in mind the remarks of Mr. Justice West in *Vijiorangam's case*⁷⁹ the correctness of the rule that female heirs have absolute power of alienation over property inherited by them, seems to be open question. It has, however, been laid down by reported decisions of the Bombay High Court that the females inheriting in their family of

birth, such as the daughter and the sister take absolutely, but those inheriting in their family of marriage such as a widow and daughter-in-law take a limited estate.

Thus it may be concluded that in the Presidency of Bombay the property inherited from male by a woman other than a widow, mother, father's mother; father's father's mother or widow of *gotraja sapindas*, i.e., son's widow, brother's widow, uncle's widow etc. is her *stridhana*. In other words, a daughter, son's daughter, daughter's daughter, sister, father's sister, niece, grandniece, sister's daughter and the like take the property inherited by them from males absolutely, that is they become full owners thereof.

PROBLEMS OF DEFINITION RAISED BY THE HINDU WOMEN'S RIGHT TO PROPERTY ACT, 1937

The Hindu Women's Right to Property Act, 1937, conferred new rights of succession on certain females. But the widow took only a "woman's estate" and not an estate in full ownership.

The Act reads as follows: Section 3 (2), "When a Hindu governed by any school of Hindu Law other than the *Dayabhaga* school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3) have in the property the same interest as he himself had."

Section 3 (3), "Any interest devolving on a Hindu widow under the provisions of the section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner."

Unluckily the language of clause (3) of section 3 (which uses the words "the woman's estate" representing well defined legal rights) might leave the Court no choice but to lay down that she has the wider power of a widow over the interest of her husband. The whole fault arises due to the use of the expression "woman's estate" to describe the nature of the estate obtained by the widow. The expression "woman's estate" has plain legal associations and cannot well be applied to mark out other estates. Even if it was designed to state briefly the legal position of a widow to be entitled under the

Act, no care was taken to obviate the doubts to which the failure to observe the discrepancies between the coparcener's and a widow's rights was bound to give rise.

WIDOW'S RIGHT TO ALIENATE THE UNDIVIDED INTEREST
IN THE JOINT FAMILY PROPERTY

The Orissa High Court in *Kunja Sahu v. Bhaghan Mohanty*⁸⁰ took the view that a widow is entitled to alienate her undivided interest (Note that this was even in a State where a male coparcener had never enjoyed that privilege), on the basis that a right of property was given to her by the Statute. By allowing the right of partition the Act, said the High Court, intended to show that the "interest" was not restricted to an exact description of the coparcener's interest and it followed that the interest was a special kind of proprietary right. As she was not expressly prevented from alienating and as besides she was given a "woman's estate" in it, which comprised the power of alienation, she could not be forbidden to alienate by considerations especially appropriate to coparceners.⁸¹ The view taken by the Orissa High Court was approved to a great extent by the Bombay High Court in *Dagdu Balu v. Namdeo*.⁸² The learned judges of the latter High Court laid down that the widow is absolutely entitled to alienate her undivided interest for legal necessity and to alienate for her life without such justification. Besides the alienee was held authorised to bring about a partition of the joint family property even though he had bought only a widow's life interest in the presumptive share.

Dr. J. D. M. Derrett observed, "The difficulty raised by the Act is that it gives the 'same interest' subject to the statement that the interest shall be the limited interest known as the Hindu 'Women's estate'. This is a patent contradiction, like saying that X will have a mango, provided that it shall be a sweet lime. The nonsensical conclusion can be avoided simply only by taking the course taken in *Kunja Sahu's* case saying that 'same interest' is not qualitative but quantitative, and means the share the husband would have taken. It is not absolutely necessary that his share should be assessed at the husband's death, nor that it should be exempt from fluctuation, but once we admit, as all the High

Courts except Orissa have admitted, that the interest fluctuates like a coparcener's interest, we are more than half-way to admitting that the same interest is same qualitatively and not quantitatively. The Bombay High Court, in Dagdu Balu's case faced by the realisation that a 'woman's estate' (i.e., a widow's estate in particular) is essentially different from a coparcener's interest, have said in effect that the Act makes a gift of a mango provided that it shall be a sweet lime, and have implemented the Act by giving the sweet lime. The plain words of the Act give a woman's estate, which involves not only that the widow may alienate absolutely for legal necessity, but that she may alienate her interest without justification provided that it be for her life. Whereas the coparcener cannot make a gift of coparcenary property, or a camouflaged gift, under *Rottala Runganatham Chetty v. Pulicat Ramasami Chetti*⁸⁵ it would seem that the Act has given wider powers of alienation in one respect as well as narrower powers in another. On this view the Orissa High Court were justified in allowing the widow to alienate her undivided interest whereas her husband had no such power."⁸⁶

In *Dagdu Balu v. Namdeo*⁸⁵ Chagla C. J. pointed out, "...if sub-S (2) stood by itself without the qualifications contained in sub-S. (3) it can hardly be disputed that the Hindu widow would have had the totality of rights which her husband had in relation to the joint family property. But the Legislature did not wish to go so far as that and therefore it enacted sub-S. (3) and provided for certain limitations upon the rights of the widow, and the limitation is that although the interest of the husband would devolve upon his wife, the interest would not be an absolute interest but it would be a limited interest...."

Again commenting upon the sub-S. (3) Dr. J. D. M. Derrett suggested, "Sub-Section (3) can be understood (as it was no doubt intended to be) as a limitation upon the coparcenary interest and as no more than that. That is to say, that in this context the interest known as the Hindu 'Woman's interest' means merely the series of limitations as follows. The property is not *stridhan* and will devolve accordingly (whatever this may mean); it is not freely alienable upon the terms known in each respective State to attach to the ordinary coparcen-

ary interest, but those who take the interest after the widow (whether by her death or surrender) will not be bound by those alienations which are outside a widow's normal powers and also outside the powers of a coparcener. In other words, the sub-section in question adds limitations and does not indirectly grant special facilities above those possessed by coparceners. Indeed, the special grant of the right of partition suggests as much. But such an interpretation has only this advantage over that adopted by Chagla C. J. in the Bombay High Court, that it makes sense of anotherwise nonsensical statutory provision, albeit at the risk of a special definition of the words 'woman's estate' in the context.⁷⁸

From the above mentioned observations it may be concluded that prior to the Hindu Women's Right to Property Act 1937, a coparcener's widow was only entitled to a right of maintenance from and out of the joint family estate. But the Act which was enacted for the purpose of giving better rights to women in respect of property, conferred on her the same interest which her husband possessed at the time of his death in the joint family estate with the limited power of alienation. The effect of sub-section (3) of sec. 3 of the Act is that the widow is entitled to alienate her own life estate in the property without any legal necessity, but if she wants to convey her undivided interest absolutely, it is essential that there should be justified necessity for the alienation.

SUCCESSION TO OR REVERSIONARY RIGHT OVER THE INTEREST
WHERE A WIDOW DIES PENDING THE SUIT

The point was discussed in *Subha Rao v. Krishna Prasadam*.⁷⁹ There the widow had brought a suit for partition of her husband's share in the joint family property. The plaintiff died, there was an application for substitution on behalf of her daughter, the application was allowed by the first Court and the daughter was substituted. Dealing with that case in revision in the High Court their Lordships observed, "To sum up S. 3(2) of the Act does not operate as severance of interest of the deceased coparcener; the right which a widow gets under the section is not as heir of her deceased husband; it is a statutory right based on the recognition of the principle that a widow is the surviving half of her deceased husband;

that the incidents in that right are those specified in the Act ; that such right is one personal to the widow and comes to an end on her death ; that the estate which the widow takes under S. 3(2) does not on her death devolve on her husband's heirs and that the right of the coparceners to take by survivorship is suspended as against the widow of the deceased coparcener and such right reasserts itself on her death."

Again in *Shamrao Bhagwantrao v. Kashibai*⁸⁸ where the widow died pending a suit, the Nagpur High Court took a similar view. The learned judge said, "The right of a widow to obtain her share in the joint family property under Hindu Women's Right to Property Act is a special one. It comes to an end with the widow when her death occurs during the pendency of a suit. The cause of action is not extended to her legal representatives."

It is submitted that the view taken in the aforesaid cases is very unsound, because the attention of their Lordships does not appear to have been drawn to that aspect of the cases as to whether the institution of a suit for partition by a widow by itself effected severance or not. Besides we fail to understand that if the widow is the survived half of her deceased husband, how the right given to her by the Act becomes a personal right of the widow, and if the estate of the husband is taken by the widow, how could that estate go to the surviving members of the family and not to the heirs of the deceased husband?

The Bombay High Court in *Shyamu Ganapati v. Vishwanath Ganapati*⁸⁹ took a different view. In that case a joint Hindu family consisted of G and his two sons by his first wife S and a son by his second wife L ; S and her sons filed a suit for partition against G, L and her son, G died during the pendency of the suit and S died thereafter. Giving judgment Gajendragadhkar J. pointed out, "At the time when G died, a suit was pending between the parties and a decree for partition was ultimately passed in this suit. That means the status of jointness by which the members of the family were bound before the institution of the suit came to be terminated at the date when the suit was filed."

With regard to that judgment of the Bombay High Court Dr. J. D. M. Derrett wrote, "Gajendragadhkar and Vyas JJ.

deserve, with respect, congratulations on having incidentally struck a hard blow at the rule adopted by the Madras, Nagpur and Orissa High Courts, to the effect that if a widow dies during the pendency of her suit for partition she dies joint and not separate, so that the interest passes to survivors, not the reversioners."⁹⁰

The view adopted by the Patna High Court on this point in the recent case of *Sabujpari v. Satrugan Isser*⁹¹ seems to be very sound and correct. There the widow died after filing a suit for partition. Delivering judgment C. P. Sinha J. pointed out, "Under the provisions of the Act a widow of a deceased coparcener is placed in the same position as the deceased coparcener was, for the reason of the fiction that half the body of the deceased husband survived in the widow; like her husband, the widow also is entitled to effect severance of the joint status of the family by an unequivocal expression of intention to separate; such unequivocal expression of intention is evidenced by instituting a suit for partition; after severance is effected in the joint family status by institution of a suit for partition by the widow, the lawful heirs, namely, the heirs of the deceased husband, are entitled to continue the partition suit, if the widow dies during the pendency of the suit; in case the widow does not exercise her right of partition and dies without expressing any intention to separate, the interest of the husband which she enjoyed, goes by survivorship to the other members of the joint family; the right which the widow gets under the Act is not by way of inheritance or survivorship or succession, but she gets that right as representing the husband himself. It is a statutory right, and the property which she gets after partition does not devolve after her death on her heirs, but goes by inheritance to the heirs of the husband."

It is concluded that when a widow institutes a suit for partition and then dies during the pendency of the suit, she is considered died separately because a definite and unambiguous intention to separate on her behalf amounts to a division in the joint family status under the Hindu Women's Right to Property Act, 1937. Thus the contrary view taken by the High Courts of Madras, Nagpur and Orissa seems to be incorrect.

DEVOLUTION OF INTEREST AFTER A WIDOW'S DEATH :

WHERE SHE DIES SEPARATED

There are conflicting views with regard to the devolution of interest after her demise. In the Full Bench case of *Parappa v. Nagamma*²² the Madras High Court observed that the devolution on the widow's death could be controlled by what she does in her lifetime. If she effects a division of the husband's interest it goes after her to his heirs as his separate property otherwise it goes to the surviving coparceners by survivorship.

On the other hand in *Bhagobai v. Bhairyalal*²³ where the widow did obtain the share of her husband on partition and died afterwards the High Court of Madhya Pradesh held, "All that the Act has allowed is a right of enjoyment either as a member of the joint family without partition, or separately after a partition, to the widow during her lifetime. She is not enabled to bring the coparcenary to an end as a coparcener can by asking for a partition. She has the same right of claiming a partition as a male owner, but not as a coparcener. That right is available only to a coparcener, which the widow is not. On the death of a widow who has taken on partition her husband's share there is a reverter of the property back to the coparcenary, with all interest of the deceased coparcener ceasing."

In our opinion, with great respect, the view taken by the Madhya Pradesh High Court is more logical and sound than that of the Madras High Court in *Parappa v. Nagamma*. The reason for this is that the preamble of the Act indicates that the said Act was passed to give better rights to women only in respect of property, and not to confer any right on reversionary heirs of her husband. Therefore, the interest which devolved on her after her husband's death under the Act, would go back to the coparcenary after her demise irrespective of the fact that she died separated from the rest of the surviving coparceners. It must be admitted that the point of view has not so far appealed to the generality of High Courts.

DEVOLUTION OF INTEREST AFTER A WIDOW'S DEATH

UNSEPARATED IN THE ABSENCE OF A COPARCENER

In *Harekrishna Das v. Jujesthi Panda*²⁴ where a widow died

in the absence of any coparcener at the time of her death, Rao J. of Nagpur High Court observed, "A widow succeeding under S. 3(2) to the interest of her husband can alienate that interest for legal necessity and if during her lifetime she sues for partition and gets that interest defined then that property reverts to her husband's heirs and not the coparcenary, and if the widow continues to enjoy the husband's interest in the joint family property without partition, the right of survivorship of the coparceners is put in abeyance and revives as soon as the widow dies. From these propositions should flow logically that the interest of the widow succeeding to her husband's interest in coparcenary property goes to the heirs of her husband after her, in the absence of any coparceners living at the time of her death."

The High Court of Madhya Bharat seems to have taken a different view in *Laxman Gopal v. Gangabai*.⁶⁵ The facts of this case are as follows: The properties in suit belonged to one Balkrishna Rao Kunte who died on 28th January, 1944 leaving his widow Radha Bai and his adopted son Vasant. Vasant died on January 17, 1948 and Radha Bai died on February 9, 1948. The plaintiff was the daughter of Balkrishna Rao's sister and defendants 1 and 2 were Radha Bai's brothers. The plaintiff alleged that the parties were Maharashtrian Brahmins and were governed by the Bombay School of law, that Radha Bai became owner of half of the property of Balkrishna in 1944 after his death under Hindu Women's Right to Property Act and when Vasant died, she became owner of the full property and as such the plaintiff was entitled to a moiety of the property which has vested in Radha Bai according to S. 3(2) of the Act. Defendant 1 who alone contested the suit contended that Radha Bai did not get any share on the death of her husband and the whole property devolved upon him being the nearest heir of the last male holder, Vasant. The Court held that there is no doubt that the defendants were entitled to the immoveable properties and the money left in the Bank by Balkrishna.

It is submitted, the learned judge did not adopt a correct view in the aforesaid case but proceeded in considering that aspect on the state of Hindu law as it existed before the passing of the Hindu Women's Right to Property Act and did

not fully consider the effect of the Act on the then existing state of Hindu law.

DEVOLUTION OF INTEREST AFTER A WIDOW'S DEATH WHEN
THE ONLY SURVIVING MEMBER OF A HINDU JOINT FAMILY
IS A WIDOW OF ANOTHER DECEASED COPARCENER

There is a difference of opinion between the Orissa and Madras High Courts on this point. In *Keluni Devi v. Jagabandhu Naik*⁹⁶ where the last two members of the joint family were the widows of the two brothers A and B who were coparceners, the learned judge held that on the death of A's widow, B's widow will not take the entire property by way of survivorship. After the death of B, the last coparcener, the coparcenary ceases to exist. A's widow and B's widow therefore possessed the properties of A and B as tenants in common. On A's widow's death, therefore, her life estate ceased and it must revert to the next heir of A.

The Madras High Court, on the other hand, has tried to prove that a widow is a coparcener in the joint family. In *Manorama Bai v. Rama Bai*⁹⁷ Ramaswami J. said, "The incidents of coparcenership can be conveniently summed up as every individual member having, by virtue of being a coparcener, an interest in coparcenary property; a right to enforce partition; until partition takes place an unpredictable and fluctuating interest in the joint and undivided property possessed and enjoyed in common by the coparcenary the interest being a fluctuating interest enlarged by deaths and diminished by the births in the family; right to be in joint possession and enjoyment of coparcenary property, reside and to be maintained in the family house; and as necessary corollary thereof, be bound by the alienations for benefit and necessity, and the legitimate acts of management of the Karta."

His Lordship therefore concluded, "There does not seem to be any justification for saying that the widow is not *pucca* coparcener and at the best is a *kucha* one not entitled to the rights of survivorship at least (the last male preserve) as a coparcener, as she has no right by birth."

With respect we may say that this decision of the Madras High Court is not sound. It cannot be denied that the two fundamental conceptions to constitute a member of the family

as a coparcener are that he has a right by birth and that he must be a male member of the Hindu joint family. These two being conspicuously absent in the case, the widow on whom certain special rights have been conferred by the provisions of this special enactment cannot aspire to the status of a coparcener in the absence of express provisions in the Act.

Thus, keeping in view that a widow is not given the status of a coparcener, we may say that the Orissa High Court's decision is correct.

NOTES

¹ Manu : IX, 194.

² Manu : X, 115 : Various commentators explain items of this list differently, but the differences are not material for the present purpose.

³ Vishnu XVII, 18.

⁴ Yajnavalkya II, 143.

⁵ Mitakshara II, XI, 2.

⁶ History of Dharmasastra Vol. 3, P. 702-3.

⁷ Brihaspati XXV, 46.

⁸ Cited in the Dayabhaga Chap. XI, Sec. I, 7.

⁹ Institutes of Narada by Dr. J. Jolly 1876, Chap. III, Vs. 28-30.

¹⁰ The position of Women in Hindu Law, 1913, P. 529.

¹¹ Katyayana quoted in the Dayabhaga Chap. XI, Sec. I, 56.

¹² The word "dayada" (heir) implies one who takes "daya" (heritage). In classical times it usually refers to a coparcener or agnatic heir of a male, but there is no proof that it has this restricted meaning here.

¹³ Mitakshara : Chap. II, Sec. I, para. 31, "It must be understood that the explanation proposed by Srikara and others restricting (the widow's succession) to the case of small property, is thus refuted. If there be legitimate sons, it is provided, whether partition be made in the owner's lifetime or after his decease, that the wife shall take a share equal to the sons. "If she make the allotments equal, his wives must be rendered partakers of like portions." And again "of heirs dividing after the death of the father, let the mother also take an equal share." Such being the case it is a mere error to say that the wife takes nothing but a substance from the wealth of her husband who died leaving no male issue.

¹⁴ Vivada Chintamani. P. K. Tagore, pp. 256, 266.

¹⁵ Dayabhaga, Chap. II, Sec. I, 56.

¹⁶ Dayabhaga, Chap. II, Sec. I, 65.

¹⁷ Dayabhaga, Chap. XI, Sec. 2, 30.

¹⁸ Dayabhaga, Chap. XI, Sec. 2, 31.

¹⁹ Dayabhaga, Chap. IV, Sec. 1, 56-66 : Chap. XI, Sec. 2, 30, 31.

²⁰ Dayakrama Sangraha, Chap. II, Sec. 2, 12.

²¹ Dayakrama Sangraha, Chap. II, Sec. II, 6.

²² Mitakshara, Chap. I, Sec. I, 21.

- ²³ Mitakshara, Chap. I, Sec. I, 27.
- ²⁴ Hindu Law, 1825, Pages 165-166.
- ²⁵ Mitakshara, Chap. II, Sec. XI, 2.
- ²⁶ Digest Of Jagannatha Book V, Chap, 9 "Woman's property",
- ²⁷ Smriti-Chandrika Chap. XI, Sec. 3, 8.
- ²⁸ Smriti-Chandrika Chap. XI, Sec. 2, Paras 1-12.
- ²⁹ Parasara Madhaviya (i.e. Madhava's Commentary on the Parasara-Smriti). Vol. III, P. 360.
- ³⁰ Sarasvativilasa (Ss. 249 Foll.)
- ³¹ Vyavahara Mayukha Chap. IV, Sec. VIII, 4.
- ³² Viramitrodaya. Translation by G. C. Sarkar, Chap. III, Pt. I Sec. 3, P. 141.
- ³³ Tegore Lectures (1883) p. 254.
- ³⁴ Tegore Lectures (1883) P. 248-251.
- ³⁵ Tegore Lectures (1883) P. 248.
- ³⁶ Tegore Lectures (1883) P. 248-249.
- ³⁷ Gautama X, 39.
- ³⁸ Tegore Lectures (1883) P. 249. Parallels for the 'Expansion' of grammatical expletives are very numerous, particularly amongst lexicographers, who naturally deal in enumerations and lists of synonyms etc.
- ³⁹ Tegore Lectures P. 249-50; The learned author's view of the probable cause of the intrusion of the word 'Kartana' cannot be accepted according to Dr. J. D. M. Derrett. But resolution of this conflict of opinion is not required for our present purpose.
- ⁴⁰ Ibid.
- ⁴¹ Yajñ. II, 115.
- ⁴² Yajñ. II, 123.
- ⁴³ Mann II, 118.
- ⁴⁴ Vas. VII, 46.
- ⁴⁵ Jolly, J. Tagore Lectures, pp. 250-51.
- ⁴⁶ "Works", Vol. V 1865, p. 24.
- ⁴⁷ Mann, Chap. XI, 3.
- ⁴⁸ Quoted in the Dayabhaga, P. 269.
- ⁴⁹ "Works", Vol. V, P. 28, 30.
- ⁵⁰ 1801, 1 Macnaghten Reports P. 44.
- ⁵¹ 1803, 1 S. D. A. Rep. 62; other references : Mt. Lalchee Koonwar v. Sheopershad Sing 1841, 7 S. D. A. Rep. 22; Mt. Joraon Koonwar v. Chowdee Downun Singh 1941, 7 S. D. A. Rep. 26.
- ⁵² 2 M. Dig. 198, 215. Decision was affirmed by the Privy Council on June 24, 1826; Morton 85.
- ⁵³ 1839, 2 M.I.A. 331.
- ⁵⁴ 1860, 8 M.I.A. 529. (The position of a widow in the Punjab appears to be exactly the same, 1926, 7 Lah. 543, except that her powers of disposition are only to be exercised for secular objects). Punjab Customary Law II, 177, 179, 203, 209.
- ⁵⁵ 1866, II M.I.A. 139. Followed in Sarat Chandra v. Charustia 1928, 55 Cal. 918; Jageo Singh v. Mussammat Raja Kuer, 1927, 6 Pat. 788.

²⁶ 1868, 12 M.I.A., 397.

²⁷ 1867, II M.I.A., 487.

²⁸ 1867, II M.I.A., 487.

²⁹ 1928, 50 AII 61.

³⁰ A.I.R. 1946, AII 61.

³¹ A.I.R. 1946, AII 61, (62-63).

³² 1878, 5 I.A. 87.

³³ 1930, 54 Bom. 780 (796).

³⁴ Sheo Singh Rai v. Musst Dakhu, 6 N. W. ; P. 382, 1874.

³⁵ 1878, 5 I.A., 87.

³⁶ Tagore Law Lectures 1908, p. 267.

³⁷ Vellanki v. Venkata 1876, 4 I.A.I. ; Bachiraju v. Venkatappadu 1865, M.H.C.R. 402 ; Maddappa v. Hanmappa 1920, 44 Bom. 297 ; Hamid Gazi v. Sadat Ali Sikdar 1940, 44 C.W.N. 443 ; Ganga Din v. Badri Singh (1943), I.L.R. 230 ; Kutti v. Radhakrishna 8 M.H. C.R. 88 ; Panchananda v. Lalchand ZW.R. 140 ; Navaneethakrishna Marudappa Thever v. Collector of Tinnevely A.I.R. 1935, Mad. 1017.

³⁸ 1899 I.L.R. 24 Bom. 192, 217 F.B., followed in Narayan v. Warsnan 1922, 46 Bom. 17 ; Purshattam v. Keshar Lal 1932, 56 Bom. 164 ; Note Pannalal v. Barna Bai A.I.R. 1950 Hyderabad 37 ; In the Bombay Presidency the step mother would come in only after the female heirs recognised in Bombay are exhausted.

³⁹ 1878, 4 Cal. 744 or 6 I.A. 15 ; Followed in Muthu Vaduga v. Dara Singha 8 I.A. 99.

⁴⁰ 1878, 4 Cal. 744 or 6 I.A. 15.

⁴¹ 1881, 8 I.A. 99 or 3 Mad. 290 (P.C.) ; Reference may be made to Hargovind v. Collector of Etah I.L.R. 1937, A II 292.

⁴² 1881, 8 I.A. 99 : Reference can be made to the following cases : Nathu v. Babu Ram A.I.R. 1936 P.C. 103 ; Kadiyala Nagabhushnam v. Movva Anandayya A.I.R. 1939 Mad. 179 ; Srinivaso Rao v. Annadhanam Anandayya Seshachariu A.I.R. 1942 Mad. 106 ; Gunam Papamma v. Valluri Kumaraju 1955 Andh. W.R. 779.

⁴³ 1859 I.B.H.C. 150 ; Reference can be made to the following cases : Phuker Singh v. Ranjit Singh I AII 664 ; Lallubhai Bapubhai v. Mankuvarbai 1876, 2 Bom. 418 ; Tuljaram Murarji v. Mathuradas 1881, 5 Bom. 671 ; Bamadar Madhowji v. Purmanandes Jeewandes 1883, 7 Bom. 163 ; Bhagirthibai v. Kahnurjirav 1886 11 Bom. 285 F.B. ; Gadadhar Bhat v. Chandrabhagabai 1892, 17 Bom. 694 F.B. ; Shakuntalabai Bhimrao v. Court of wards 1942, Nag. 57 D.B.

⁴⁴ 1859, I Bom. H.C.R. 117, 128 ; Reference can be made to the following cases : Lallubhai Bapubhai v. Mankuvarbai 1876, 2 Bom. 421 ; Sakharam Sada-Shir Adhibari v. Sitabai 1879, 3 Bom. 358 ; Dhondur Gurav v. Gangabai 1879, 3 Bom. 371, Kesserbai v. Volalib Raoji 1879, 4 Bom. 196 ; Vithaldas Manichdas v. Jeshubai 1879, 4 Bom. 221 ; Bhagirthibai v. Baya 293, F.B. ; Godadhar Bhat v. Chandrabhagabai 1892, 17 Bom. 695 F.B. ; Gulappa v. Tayawa 1907, 31 Bom. 453 ; Hari Annaji v. Vasudeo 1914, 38 Bom. 438 ; Appaji v. Mohan Lal 1930, 54 Bom. 564 ; Bai Mahalaxmi v. Distt. Court Broach A.I.R. 1943, Bom. 213 ; Poptlal Dharsi v. Bai Dahi

Chatrabhuj 1948, I. Sau. L.R. 3, 13 ; Gajadher v. Parmanand 1951, 195 N.L.J. Note 63.

⁷⁵ I.L.R. 3 Mad. 290 P.C.

⁷⁶ *Digest of Hindu Law* by West and Buhler, 3rd Ed. p. 432.

⁷⁷ I.L.R. II Bom. 285 F.B. ; Reference may be made to the following : Jankibai v. Sundra 14. Bom. 612 ; Gulappa v. Tayawa 13 Bom. 453 ; Kisan v. Bapu A.I.R. 1925, Bom. 424.

⁷⁸ Lectures on the Hindu Law of Marriage and Stridhana by Gurudass Banerjee : 2nd Ed. 1896, p. 330.

⁷⁹ 1871, 8 B.H.C.R., 244.

⁸⁰ A.I.R. 1951, Orissa 35.

⁸¹ A.I.R. 1951, Orissa 35, (37).

⁸² 1954, 56 Bom. L.R. 513 ; Followed in Pem Mahton v. Bandhu Mahto, A.I.R. 1958, Pat. 20.

⁸³ 1903 I.L.R. 27 Mad. 162.

⁸⁴ "Three questions arising out of the Hindu Women's Rights to Property Act 1937", 1954, 56 Bombay L.R.J. 137, 142-143.

⁸⁵ 1954, 56 Bombay L.R.J. 513, 515.

⁸⁶ "Three Questions arising out of the Hindu Women's Right to Property Act. 1937". 1954, 56 Bom. L.R. 137, 143.

⁸⁷ A.I.R., 1954, Mad. 227.

⁸⁸ A.I.R., 1956, Nag. 110.

⁸⁹ 1955 ; 57 Bom. L.R. 807, 813.

⁹⁰ Two Difficult Bombay Cases in Hindu Law, 1956, 57 Bom. L.R. Journal 97 ; 101.

⁹¹ A.I.R., 1958, Pat. 405.

⁹² A.I.R., 1954, Mad. 576, F. B.

⁹³ A.I.R., 1957, M.P. 29.

⁹⁴ A.I.R., 1956, Orissa 73.

⁹⁵ A.I.R., 1958, Orissa 47.

⁹⁶ A.I.R., 1957, Mad. 259.

⁹⁷ A.I.R. (1957), Mad. 259.

CHAPTER III

THE WOMAN'S RIGHT OF ALIENATION

In order to be familiar with the purposes for which a Hindu woman can alienate the estate she inherits or otherwise acquires subject to the limited estate, we will have to examine various texts, commentaries and judicial decisions on the subject. Expressing his opinion, Nilakantha, the author of *Vyavahara Mayukha*, seems to be in favour of gifts or mortgages or other sorts of alienation for spiritual and religious purposes. In support he quotes the texts of Prajapati and a text of Katyayana. The text of Katyayana on this point is, "A widow always engaged in meritorious observances and fast, constant in the duties of celibacy, intent upon restraining her passions and making holy trips, shall reach the heavenly abodes even if she has no son."¹

Mitra Misra, the author of the *Viramitrodaya* expressing a similar opinion, observes, "Therefore it is established that in making gifts for spiritual purposes a sale or mortgage for the purpose of performing what is necessary from a spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband; the restriction, however, is intended to prohibit gifts to players, dancers and the like, as well as sale and mortgage without necessity."²

The *Smṛiti Chandrika* permits the widow to transfer property in the form of gift for charitable and religious purposes but it prohibits her from making a gift to dancers and the like.³ From these verses it is apparent that a Hindu widow can alienate property inherited from her husband merely for necessary or religious and charitable purposes.

Besides Dr. P. V. Kane observes, "But a gift though promised need not be paid or carried out if the promisee turns out to be an irreligious man. Gotāma, Narada and Brihaspati provide that he who enjoys an invalid gift and he who makes a forbidden gift are both to be punished by the King".⁴

Commenting on the subject the author of the *Dāyabhāga* says, "But since a widow benefits her husband by the preserva-

tion of her person, the use of property sufficient for that purpose is authorised. In like manner (since the benefit of the husband is to be consulted) even a gift or alienation is permitted for the completion of her husband's funeral rites." Furthermore he says, "Let not women make waste; here 'waste' intends expenditure not useful to the owner of the property. Hence if she be unable to subsist otherwise, she is authorised to mortgage the property; or if still unable, she may sell or otherwise alien it; for the same reason is equally applicable".⁵ In other words, the author of the *Dāyabhāga* emphasises the doctrine of 'spiritual benefit'.

Making an exhaustive study of the subject under discussion W. H. Macnaghten points out, "She has not an absolute proprietary right, neither can she, in strictness, be called even a tenant for life; for the law provides her successors and restricts her use of property to very narrow limits. She cannot dispose of the smallest part except for necessary purposes and certain other objects particularly specified. It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so that should she make waste, they who have the reversionary interest have clearly a right to restrain her from doing so. What constitutes waste, however, must be determined by the circumstances of each individual case. The law has not defined the limits of her discretion with sufficient accuracy and it was probably never in the contemplation of the legislator⁶ that the widow should live apart from and out of the personal control of her husband's relations or possess the ability to expend more than they deem right and proper. In assigning a motive for the ordinance that a widow should succeed to her husband, and at the same time that she should be deprived of the advantages enjoyed by a tenant for life even, it seems most consistent with probability that it originated in a desire to secure, against all the contingencies, a provision for the helpless widow, and thereby prevent her from having recourse to practices by which the fame and honour of the family might be tarnished. By giving her nominal property, she acquires considerations and responsibility and by making her the depository of the wealth, she is guarded against the neglect or cruelty of her husband's relations. At the same time, by limiting her power, a barrier is

raised against the effects of female improvidence and worldly experience. This opinion receives corroboration from the distinction which prevails in the Benares school which may be said to be the fountain and source of all Hindu Law".⁷

JUDICIAL DECISIONS : WIDOW'S POWER OF ALIENATION

Proceeding to the judicial decisions on the point we observed that in the case of *Nandkumar Rai v. Rajindranaraen*⁸, the learned judge of the Sadar Dawani Adalat held that the widow of a Hindu cannot alienate the estate of her deceased husband by a deed of gift without the consent of his heirs. The same view was adopted in *Sreenarain Rai v. Bhya Jha* where it was laid down that a Hindu widow cannot by the law of the Mithila, Bengal or Benares schools, make a gift of any of her deceased husband's immovable property without the express consent of the heirs except for the special reasons set forth in the Sastras.⁹

Again in *Bissonat Dutt v. Doorgapersaud* where a Hindu died leaving his minor sons and a daughter along with his widow, it was observed that a widow left with infant sons and daughter may sell the real property of the sons for the necessary subsistence of herself and family, if there be no other certain means of providing for them, and this not only to procure the necessities of life but also for *Sraddha* ceremonies and other necessary religious duties, and for the marriage of a daughter; and she is at liberty to sell such property for such purposes, though the family of her late husband at the time gave her children casual relief, the family being in great distress and the relief casual.¹⁰

Allowing a widow to alienate property for religious purposes in *Mt. Gyan Koowur v. Dookhurnsingh*¹¹ the Sadar Dawani Adalat held that a Hindu widow, holding only a life estate in her husband's landed property cannot alienate it without the concurrence of her husband's heirs at law except for religious purposes.

In *Keerutsing v. Koolahulsing*¹² where a party claimed possession of a Raj by virtue of a *Wasseeeyat-namah*, (or deed operating as a will) from the widow of a deceased *Zemindar*, who died without issue, leaving collateral heirs, a question arose: "The whole of the *Zemindary* having

descended to Rajah Juswunt Sing, after having been previously held by several generations and Rajah Juswunt Sing having died without children, leaving his wife as his heiress, if the said wife, by the execution of a *Wusseeyat-namah* transferred the *Zemindary* to Keerut Sing, will such a transfer be legal according to Sastras or not?" Answer was, "A Hindow woman has not the power of granting property to another; if the woman preferred to give the property referred to, to the near relation, who may possess strong claims upon the property, still the transfer will be illegal without the consent of the heirs."¹³ In other words, the Judicial Committee refused to decide on the validity of the instrument devising the *Raj*, being of opinion that the Ranee (the widow) was incompetent by law to execute such an instrument to the prejudice of her deceased husband's heirs.

WIDOW'S POWER OF ALIENATION CAN BE EXERCISED IN CASE OF
NECESSITY AND FOR SPIRITUAL PURPOSES

Again, the Privy Council in the case of collector of Masulipatan *v.* Cavalry Vencat¹⁴ observed that, "The widow cannot of her own will alien the property except for special purposes. For religious and charitable purposes are those which are supposed to conduce to the spiritual welfare of her husband; she has the larger power of disposition than that she possesses for purely worldly purposes. To support an alienation for the last she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred. But surely it is not the necessary or logical consequence of this latter proposition that in the absence of collateral heirs to the husband are on their failure, the fetter on the widow's power of alienation altogether drops. The exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose for which the alienation is made must be proper." The Judicial Committee tell us that a widow can make use of her powers for an alienation of property in a case of necessity and for certain spiritual purposes.

In the case of *Inder v. Laltu*¹⁵ Mahmood, J. doubted

whether the alienations by a Hindu widow for any purposes other than those which contribute to the spiritual welfare of her deceased husband, were recognised by the original texts of the Hindu Law. It seems, it is submitted that the learned judge was not made acquainted with the above mentioned texts of the *Viramitrodaya*. "That in making sale gift for the purpose of performing what is necessary in spiritual or temporal point of view, the widow's right does certainly extend to the entire estate of her husband." It is quite apparent that the original text of Hindu Law contemplated the problems of necessity arising from purely worldly purposes.

INTERPRETATION OF THE TERM 'LEGAL NECESSITY'

It seems rather difficult to define the term 'Legal Necessity'. In order to know what constitutes 'Legal Necessity', each case must be judged on its own merits.¹⁶ In the case of *Ram Sumran v. Shyama Kumari*,¹⁷ the judicial Committee have pointed out, "the word 'necessity' used in this connection has a somewhat special, almost technical meaning. Necessity does not mean actual compulsion, but a kind of pressure which the law recognises as serious and sufficient." On the other hand, in the absence of a pressure on the estate an alienation will not be upheld even though the full value for the property is offered.¹⁸

IS LITIGATION A LEGAL NECESSITY?

One question which arises is whether litigation can be taken as a legal necessity. In order to answer this question it is essential to distinguish litigation designed for the safety of the estate from litigation intended to make profits to the estate. The former sort of litigation is indeed recognised as legal necessity. The Privy Council in the case of *Karimuddin v. Govind Krishna*¹⁹ have laid down that. "The preservation of the estate of her husband and the cost of litigation for that purpose were objects which justified a widow in incurring debt and alienating a sufficient amount of the property to discharge it." But so far as the litigation is concerned which aims at benefiting the estate it may be argued that if such litigation proves to be advantageous in the end, any transfer of property made by the widow, which may have assisted such litigation

will bind the reversioners; because he who enjoys the profits ought to suffer the loss also. It is beyond the powers of a widow to indulge in speculative litigation. Though a widow engaged in litigation would appear to be entitled to borrow money to bear the cost of litigation by means of a transfer of property, yet her powers for raising money are plainly restricted. Whereas the cost of litigation for maintaining the estate is regarded a recognised form of necessity, this does not mean that a widow engaged in litigation has unrestricted powers of borrowing.²⁰

Payments of the arrears of Government Revenue: Likewise where the estate is bound for the payment of arrears of government revenues and of decrees of rent after the death of the deceased owner, an alienation made by a widow will be upheld provided the widow had not sufficient money at the time of alienation to discharge the revenue or the decree.²¹

Necessary repairs of the house: In the Full Bench case of *Hurry Mohan v. Gonesh Chandra*²², the Calcutta High Court has pointed out that the necessary repairs of houses by a daughter in possession of her father's property are recognised as a necessity which will not only support an alienation of property by her for the said purpose, but will give to the person who makes such repairs a charge on the property in the hands of of the reversioner. The power of a widow or other female in respect of an alienation is similar to that of a manager of a Hindu joint family property or of an infant's estate.²³

PRINCIPLES GOVERNING THE ACTION OF THE MANAGER OF AN
INFANT IN DEALING WITH THE ESTATE OF THE LATTER
HELD APPLICABLE TO THE CASE OF WIDOWS AND
OTHER FEMALE OWNERS

In the celebrated case of *Hanooman Prasad v. Mt. Baboee*, the Privy Council establishing the law on the point say, "The power of the manager of an infant heir to charge an estate not his own is, under the Hindu Law, a limited and qualified power. It can only be exercised rightly in case of need or for the benefit of the estate. But where in a particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the bonafide lender is not affected by the precedent mismanagement of the estate".²⁴ The widows and

the other female owners of limited interest are governed by these principles. In the case of *Kameshwar Prasad v. Run Bahadoor Singh*²⁵, the Judicial Committee laid down, "Their Lordships in no degree depart from the principles laid down in the case of *Hanooman Prasad Panday v. Mt. Babooe Munraj Koonweree* which has been so often cited. They have applied those principles in recent cases not only to the case of a manager for an infant which was the case there, but to transactions on all fours with the present, namely alienations by a widow, and to transactions in which a father, in derogation of the rights of a son under the *Mitakshara* Law, has made an alienation of ancestral family estate."

RESPONSIBILITY OF A BONAFIDE ALIENEE

The Privy Council in the case of *Hanooman Prasad*²⁶ laid down a principle that a person dealing with the manager of an infant's estate should not give the money without proper enquiries as to the existence and kind of necessity, although he is not bound to see to the application of the money. Their Lordships say, "Their Lordships do not think that a bonafide creditor should suffer when he has acted honestly and with due caution, but is himself deceived".²⁷ The same principles apply in the case of a lender dealing with a female heir in respect of the limited estate. Therefore it has been observed that in order that the alienee may justify a transfer of property made by a Hindu widow, it must be pointed out either that there was legal necessity or that the lender had reasonable grounds to believe that there was such necessity.²⁸ The Privy Council, in the case of *Sham Sundar Lal v. Aochan Kanwar* where the estate of a Hindu family in which after the death of the father and his widow, a daughter held an interest for life, comprised a family trade, carried on by a manager on her account, held that it is not incumbent on the defendant who relies on the absence of legal necessity for the borrowing by a woman, holding her limited estate, to plead or prove such absence: but it is for the plaintiff to state and to prove all that will give validity to the charge.²⁹ In order to prove necessity it should be established *inter alia* that the qualified owner had not enough money in his or her possession to meet the demands.³⁰

PERMANENT LEASES GRANTED BY THE WIDOW FOR THE BENEFIT
OF THE ESTATE

With regard to the powers of a widow to grant a permanent lease or a lease for a long time so as to bind the reversioners, it has been held in the Calcutta High Court that a widow allowing a permanent lease of her husband's estate can bind the reversion by this provided it is for the benefit of the estate.³¹ But the Bombay High Court has laid down that a permanent transfer of immovable property by a widow for improvement or development of the estate but not for the purpose or preserving it, is invalid, though it is expected to bring more income. It was argued in this case that 'necessity' implies the same sort of pressure from without and not simply a wish to better the estate. Because this law involves vast powers of administration which might suggest an entitlement to indulge in a speculative business.³²

It may be observed that there can be no point of legal necessity when the manager of a joint Hindu family leases lands to tenants in the ordinary course of village management. In the capacity of a manager it is entirely at his discretion to cultivate them himself or let them out.³³ But in *Basdeo v. Muhammed* it is clearly laid down by the Allahabad High Court that he cannot transfer any land by way of permanent lease except for legal necessity or benefit of the estate or even for a long term.³⁴

UNSECURED DEBTS, HOW FAR BINDING ON REVERSIONARY HEIRS

The question whether the debts incurred by a widow or a daughter for a justified purpose will of their own account attach to the estate in possession of reversionary heirs, though such a debt was not utilised or created by a sale or mortgage of the estate, has given rise to conflicting views.

The Calcutta High Court has laid down that if the debt was secured for legal necessity, it will certainly bind the reversion.³⁵ On the other hand in the courts of Madras and Allahabad it is held that the estate in the possession of the reversioners will not be legally bound because the widow or the daughter failed to make the estate responsible in the absence of a definite charge. In other words the creditor must be taken to have regarded the personal liability of the widow

or the daughter as adequate. As he did not care for the estate as a security for the recovery of debts, the estate is not considered responsible.³⁶ Further the Allahabad High Court in the case of *Bhup Singh v. Jhamman Singh*³⁷ has pointed out that where a widow or other limited heir borrows money on a simple bond for the purposes of the estate and subsequently gives security of the estate for the payment of the debt, the estate is bound. In the Bombay High Court in the case of *Sakrabhai v. Magan Lal*,³⁸ Sir Lawrence Jenkins, C. J., having studied all the cases on the point and making a thorough examination of that part of the *Mitakshara* which mentions debts, expressed the opinion that a widow, like a manager, can borrow on the security of the property in case of necessity making it legally bound even after her death. In this case the debts were actually trade debts properly secured by a Hindu widow on the good reputation of the business which she has acquired as heiress of her deceased husband. His Lordship says, "The cases show that the manager of a family business can make its assets liable for a trade debt, without a specific charge, and *Kameshwar's case*³⁹ shows that the ability of a widow to charge the inheritance so as to affect it in the hands of reversioners is judged by the same principles as are applicable to a charge by a manager. I do not think that it was intended to disturb that principle when it was said in *Sham Sundar v. Acchan Kunwar*⁴⁰ that "the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family, for it appears from the rest of the judgment, as in the case of a manager, so in relation to a widow, the touchstone is 'necessity'."

The genuine principle seems to be that where a widow borrows money or incurs debt it is first of all a question of fact in each case whether she really intended to bind the estate as well as herself or herself alone⁴¹, and secondly whether the debt is for an object binding on the estate.⁴²

The widow does not possess the special powers traditionally confided to the manager of a coparcenary which owns a family business in order to contract debts for the running of that business. In such cases there is a presumption that the manager is authorised to contract the debt with specific proof of necessity, and the burden on an alienee in such circum-

stances is correspondingly less. The widow has no such additional powers.

PROVISION FOR FUTURE MAINTENANCE BY A WIDOW

A further question arises whether a widow or any other limited female heir can bind the estate inherited by her for the purposes of her future maintenance. In the Bombay High Court in the case of *Sadashir v. Dhakubai*,⁴³ Mariatt, J. said : "But it has been held that a Hindu widow may validly charge her husband's estate with the payment of money received for her maintenance, if the income of the estate be sufficient." But the judicial decisions appeared to be conflicting for the point whether she can charge her husband's estate even for her future maintenance.

In the case of *Gyanukashiba v. Sarubai*,⁴⁴ Sir John Beaumont, C. J. observed, "A Hindu widow has no power to sell her husband's estate in return for a covenant to pay her an annuity for maintenance for the rest of her life." A similar view was taken in *Ratnam v. Ganapati*⁴⁵ by the Madras High Court. But in a very recent case of *Neelambal Ammal v. Rajarathnam*⁴⁶ in the same High Court, Govind Menon, J. held, "No hard and fast rule can be laid down as to whether a Hindu widow in possession of very little property left by her husband can or cannot sell the same for future maintenance. The principle of law is well established that a widow can alienate her husband's property for necessity of the estate. No authority is needed for that proposition. As stated in the order of reference Venkata Subba Rao, J. in *Ramalinga v. Parvathammal*,⁴⁷ and Devadoss, J. in *Kunthulinga v. Shanmug*,⁴⁸ took a liberal view that where there is compelling necessity, the widow can sell the entire property of her husband for the purpose of her future maintenance." He continued, "In our opinion it is difficult to say with exactitude that she has no power. Everything will depend on the facts of the case."

We may say that the view taken by Sir John Beaumont, C. J. in *Gyanukashiba v. Sarubai*,⁴⁹ and followed by the Madras High Court in *Rathnam v. Ganapathi*,⁵⁰ is quite sound because such transactions may have a speculative character. It is not denied that to raise funds for past maintenance of a widow or for her current maintenance, would be a matter of

necessity under Hindu Law. But we find no authority for the proposition that a widow can sell her husband's property to provide future maintenance, and on principle we do not see how this can be done. The value is too uncertain. The thing to be taken into account in assessing maintenance is the separate property which the widow may possess. It is impossible to say what separate property she may acquire during the currency of the annuity, and in the future the amount of the annuity may be larger than necessity can justify.

POWERS OF A HINDU WIDOW TO ALIENATE FOR RELIGIOUS OR CHARITABLE PURPOSES

In the case of *Collector of Masulipattan v. Cavalry Venkate Narainapale*,⁵¹ a Hindu widow inheriting the estate of her deceased husband A, executed a deed of endowment in favour of the *Pujari* of a *Thakurbari* (Temple) established by the reversionary heirs of her deceased husband after the death of the widow to set aside the alienation their Lordships held, "In as much as the idol was established by the mother of deceased and he had made no provision for its maintenance; and the dedication was *prima facie* one for the widow's own spiritual welfare, not for that of her deceased husband . . ." They further observed, "She cannot of her own will alienate the property except for special purposes. For religious or charitable purposes or those which are supposed to conduce to the spiritual welfare of her husband, she has larger powers of disposition than that which she possesses for purely worldly purposes."⁵²

DEFINITION OF THE TERM 'RELIGIOUS PURPOSES'

With regard to the religious purposes, expressing their opinion in the case of *Kasinath Basak v. Harasundari*,⁵³ the Court Pandits observed that religious purposes include a portion to a daughter, building temples for religious worship, digging tanks, and the like'.

Defining the term 'Religious Purpose', B. K. Mukherjee, J. says, "All that we understand by religious purpose is that the purpose or object is to secure the spiritual well-being of a person or persons according to the tenets of the particular religion which she or they believe in. This may imply belief

in a future state of existence where a man reaps the fruit of his pious act done in this world, and it may be connected with the idea of atonement for past errors of a man and that of making peace with his Maker".⁶⁴

Analysing religious or charitable acts, Mr. S. V. Gupte says, "For the purposes the extent to which the corpus may be alienated a distinction approved by the Privy Council⁶⁵ has been made between (i) religious or charitable acts which are essential and obligatory and (ii) religious or charitable acts which though pious and meritorious are neither indispensable nor obligatory. Where the act belongs to the first category the limited heir may dispose of even the whole of the property⁶⁶, but where the act belongs to the second the limited heir may not dispose of more than a small portion of the property.⁶⁷ The extent of the portion in such a case depends upon the bulk of the estate and the circumstances of the family".⁶⁸ Similarly in the recent case of Kashirao Bhaguji v. Motiram Mudgalji⁶⁹ where a Hindu widow who had inherited the estate of her deceased husband, constructed an image of Ramchandra in the temple built by her and executed an endowment of the immovable property inherited by her in favour of the Devasthan, it was held that the deed of endowment was beyond her competence. Sen, J. said, "The powers of a Hindu widow to alienate the property for purposes of indispensable religious duties is wider than in respect of optional religious acts. In the former case if the income of the property or the property itself is not sufficient to cover the expenses, she is entitled to sell the whole of it. In the latter case she can alienate a small portion of the property for the pious or charitable purpose she may have in view."

EXPENSES FOR PILGRIMAGES BY THE WIDOW

The courts have been trying to define the religious or charitable purposes with reference to the spiritual welfare of the deceased owner. Thus the expenses incurred by a widow for a pilgrimage to Gaya for performing the *Sraddha* of her deceased husband are considered legitimate expenses for which she can alienate her husband's property within reasonable limit, because such pilgrimages conduce to the spiritual benefit of the husband.⁷⁰ But an old case, Hurromohan Audhi-

karee v. Auluck Donee Dasee,⁶¹ has taken a view that a pilgrimage to Benares does not fall within the religious purpose of conferring spiritual benefit upon the husband. In Bai Chanchal v. Chamanlal, Madgavkar, J. observed, "...pilgrimages in general regarded as spiritual act are not absolutely necessary but only at the most commendable; and while the courts do not disallow any expenditure reasonable under the circumstances out of the estate, they will also scrutinise with care such expenditure, particularly where it relates to distant pilgrimages, the expenses are not essential considering the residence of the parties and the custom of the caste. Obviously a pilgrimage by a Gujrati to Dakare or by a Maratha to Pandharpur stands on a different footing to a pilgrimage by either to Benares or to Rameshwar".⁶² In the High Court of Allahabad, in Ram Adhar Miser v. Jugunu Miser,⁶³ Muhammad Ismail, J. has also pointed out, "A Hindu widow is not entitled to transfer her husband's property for pilgrimage generally. She may, however, incur reasonable expenditure for the performance of religious or charitable acts which are supposed to conduce to the spiritual welfare of the deceased owner and for this purpose may alienate a small portion of the property."

Dr. P. V. Kane observed, "It is clear, therefore, that it was recognised early that the Tirthyatra was a popular way for redemption of sins in the case of all classes of men and women. Though the Hindu woman succeeding as heir to her husband's estate has only a limited and qualified ownership over it, judicial decisions have recognised that she can alienate a small portion of her husband's estate for the expenses of a pilgrimage to Gaya for performing her husband's *Śraddha* for the latter's spiritual benefit or of a pilgrimage to Pandharpur".⁶⁴

In the recent case of Shripati Raoji v. Viswanath⁶⁵ where the widow sold the only remaining piece of land for a sum of Rs. 200/- for going upon a pilgrimage to Kashi, the Bombay High Court held that the alienation was not justified by legal necessity. Dixit, J. observed in that case, "Undoubtedly, widow has authority to act for the spiritual benefit of her husband. But the act must be one for the spiritual benefit of her husband and the alienation must be confined to a small portion of the husband's estate".⁶⁶ Similar alienations or gifts for the

performance of the funeral rites of the husband have been held valid on the ground of absolute necessity.

The spiritual welfare to the deceased owner is the real test of religious purposes⁶⁷; so that where a Hindu widow sold a portion of the estate in her possession in order to meet the expenses of the Sraddha of her mother-in-law the alienation was held valid, because the deed she performed was meant (albeit indirectly) for the welfare of her deceased husband's soul.⁶⁸ In other words if the purpose contributes to the spiritual benefit of the deceased owner, it does not matter how the deceased owner is related to the limited female heir, whether a husband or father or father-in-law or otherwise.⁶⁹ Though it has been decided in many cases that a widow is not allowed to alienate her husband's property for such religious or charitable acts which are designed to obtain her own spiritual benefit.⁷⁰ It may be said that the deeds through which a widow alone acquires religious merits and the deeds intended to secure the spiritual welfare of her deceased husband or designed to let her share with him, can hardly be distinguished. The reason for this is that the wife always joins her husband during the life-time in all the religious offerings and rites and this mutual relation does not come to an end by the death of either of them.⁷¹ Commenting on this Brihaspati says, "In Scripture and in the Code of Law, as well as in popular practice, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of good and evil acts".⁷² An accurate rule may be found reflected in many cases of the different High Courts, where it is laid down that though some of the decisions can be justified on the ground that the alienations in question were not within proper limit or in accord with the common notion of Hindu Law. They cannot be supported on the view that they were only concerned with the spiritual welfare of the widow which is inseparable from her husband's spiritual welfare.⁷³

ALIENATIONS BY A WIDOW FOR THE PAYMENTS OF BARRED DEBTS OF THE HUSBAND

Since it is established that a widow is authorised to alienate her husband's property for pious purposes under the Hindu Law, amongst these is the payment of the deceased hus-

band's debts, even though they are barred by limitations. There fore it is laid down in various cases that the alienations made by a widow with the object of paying time-barred debts of the husband provided they are not repudiated by him, are held justified and binding on the reversion. But where she executes a mortgage to pay off her husband's debts and later executes another to pay off the claim under the prior one which had become time-barred, the second mortgage was to pay off her time-barred debt and there was no legal necessity.⁷⁴

ALIENATIONS BY A WIDOW FOR THE MARRIAGE EXPENSES OF HER HUSBAND'S DEPENDANTS

As a limited heir is bound to perform the marriages of dependants of the deceased owner such as his daughter, son's daughter, grandson's daughter and others, she may dispose of property to meet the essential expenditure.⁷⁵ Thus in the case of *Ramasami v. Vengiduswami* it was held that under Hindu Law a female heir is authorised to do whatever is necessary and reasonable in connection with the marriage of the relations of the deceased owner, who would have been dependent on him had he been alive. In pursuance of this power she can make a gift to a daughter at the time of her marriage or the Gowna ceremony and a gift to a son-in-law on the occasion of the daughter's marriage provided it is of a reasonable amount.⁷⁶ In the recent case of *Kamala Devi v. Bachulal*,⁷⁷ expressing their views on the widow's power of voluntary transference of property without considerations to a daughter or a son-in-law, their Lordships of the Supreme Court said, "Gifts by a widow of landed property to her daughter or son-in-law on the occasion of marriage are well recognised in Hindu Law. If a promise is made of such a gift for or at the time of the marriage that promise may be fulfilled afterwards and it is not essential to make a gift at the time of the marriage but it may be made afterwards in fulfilment of the promise."

Referring to a series of cases on the subject, it may be said that a female limited owner is entitled to make a valid donation of movable or immovable property inherited by her from her husband to a daughter or son-in-law if it does not exceed reasonable limit. With regard to the term 'reasonable limit' we may refer to *Emineni Galb v. Veeranarayana*.⁷⁸ In

that case the widow made a gift of about $\frac{3}{4}$ of property (entire extent being acres 3-45). Giving judgment Chandra Reddy, J. said, "No hard and fast rule can be laid down as to what is a reasonable extent in a matter of this kind. Normally, if bulk of the property is gifted away, it would not be deemed to be a reasonable fraction of the estate. In the circumstances of the instant case a gift of property of about $\frac{3}{4}$ of the entire estate is unreasonable and one acre of land will be within reasonable limits."

POWERS OF A WIDOW TO ALIENATE PROPERTY WITH THE CONSENT OF THE HUSBAND'S HEIRS

A question arises whether the consent of reversioners will completely validate an alienation by a widow or other limited female heir which is not supported by any legal necessity. This question was first mooted in the case of the Collector of Masulipatam *v.* Cavaiy Vencata,²⁹ where their Lordships of the Privy Council said, ".....on the other hand, it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred.....the exception in favour of alienation with consent may be due to a presumption of law that where that consent is given the purpose follows the alienation is made must be proper."

Again, the Judicial Committee in the case of Raj Lukhee Debea *v.* Gokool Chunder³⁰ laid down: "This kindred in such case must generally be understood to be all those who are likely to be entrusted in disputing the transaction. At all events, there should be such a concurrence of the members of the family as suffices to raise a presumption that the transaction was a fair one and one justified by Hindu Law." With regard to the practical application of this general principle there are conflicting views in the High Courts in India. A Full Bench of Allahabad High Court in Ramphal Rai *v.* Tulakurai³¹ observed, "The plain principle deducible from these rulings of the Privy Council is, that in order to validate an alienation by a Hindu widow of her deceased husband's estate for purposes other than those sanctioned by Hindu Law, it must have been the consent of all those among his kindred, who can reasonably be regarded as having an interest

in questioning the transaction." Thus they held that the rights of a remote reversioner who after all has a contingent interest in the estate were not affected by the consent of the heir presumptive to an alienation by a widow. But we may add that since later Privy Council and Supreme Court decisions this view is no longer sound even in Allahabad.

CONSENT OF THE REVERSIONARY HEIRS FOR THE TIME BEING :
HOW FAR SUFFICIENT ?

The High Court of Calcutta adopted a different view. In *Nabokishore Sarma Roy v. Harinath Sarma Roy*,⁸² a Full Bench laid down that under the Hindu Law prevalent in Bengal, "A transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is actual reversioner upon the death of the widow, from assenting his title to the property." Sir Richard Garth, C.J. of the Calcutta High Court pointed out, "If it is once established as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation, which the widow and the next heir may thus agree to make".⁸³ The Calcutta Full Bench seems to hold the same view as confirmed in *Behari Lal v. Madho Lal* by the Privy Council where their Lordships observed, "It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely destroying her life interest".⁸⁴ As to the priority of this, see below.

The Madras High Court has taken the Calcutta view so far as it lays down that a widow can make a valid surrender of her entire estate to the next reversioner for the time being. But the Madras High Court does not allow that an alienation of a portion of the property with the concurrence of the then next heir is valid.⁸⁵ The point was raised in *Vinayak v. Govind*⁸⁶ also where Sir Lawrence Jenkins, C.J. said, "There can be no question that apart from legal necessity, a widow can validly alienate land that has devolved on her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy. The High Court of Calcutta on the

whole appears to favour the view that the consent derives its effect from the power supposed to reside in a widow of accelerating, by the surrender of her own interest, the interest of the reversioners. It is impossible not to feel some difficulty as to this doctrine; for it would seem to rest on the application to a Hindu widow's estate of the English doctrine of the merger of a particular estate, with a result that the devolution of a property according to law is influenced by the acts of those who are simply in the possible line of succession.⁸⁷ The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity. This has a parallel in the law relating to a widow's adoption under certain circumstances and it finds support in texts⁸⁸.....this view has, too, in a large major the sanction of the Privy Council.....turning them to Bombay, the High Court here appears to have accepted this view rather than that which finds favour in Calcutta." This was the state of authorities in India, when the question was raised before the Privy Council in the case of *Bajrangie Singh v. Manokarnika Bakhsha Singh*.⁸⁹ Reviewing the judgment of all the High Courts, their Lordships of the Privy Council pointed out that the rule laid down in the case of *Raj Lukhee Debi v. Golap Chunder*⁹⁰ was accepted in the Indian peninsula and that the only point needing consideration was "the quantum of consent necessary". Expressing their views on the subject their Lordships of the Privy Council laid down, "The High Court of Allahabad, indeed, does not recognise the validity of surrenders in favour, or alienation with the consent, of presumptive reversioners, so as to defeat the title of the actual reversioner, at the time of the widow's death. But this restriction is at variance with the practice in other parts of India in which the *Mitakshara* Law prevails. Their Lordships have not been referred to in any cases in the province of Oudh in which this restriction has been acted upon; and though they would be unwilling to extend the widow's power of alienation beyond its present limits, they cannot adopt the further limitations which the Allahabad High Court has sought to establish. They agreed with the High Court of Calcutta⁹¹ that ordinarily the consent of the whole body of the persons constituting the next reversion should be obtained."

though there may be cases in which special circumstances may render strict enforcement of this rule impossible." The principle stated in this case settles that the concurrence of the next reversioner or reversioners will make an alienation valid. It does not make any difference if the assent of all the reversioners is taken after the alienation because every adoption or ratification of an act already done has retrospective effect and is equal to a previous request to do it. In the case before the Privy Council the widow alienated the entire property piece by piece by successive deeds. Therefore the case may be taken as a leading authority for the proposition that a widow may validly transfer a portion of her husband's property with the concurrence of the presumptive reversioners.²² But the Madras High Court took a different view and adhered to the principle stated by the Full Bench of that Court, in which it was held that the alienation in order to be effective must comprise the whole of the limited estate.²³ In the case of Rangoppa v. Kamti,²⁴ the learned Judges of the Madras High Court disapproving the controversy pointed out that the said Full Bench has been practically overruled by the decision of the Judicial Committee. There was thus a conflict between the Calcutta and Madras rulings on the interpretation of the decisions in Bajarangi Singh, v. Manokarnika²⁵ on this point.

At length the case of Rangasami v. Nachiappa²⁶ is to be considered a paramount authority on the subject. In this case not only has the effect of the concurrence of the reversioners been thoroughly discussed but also the Judicial Committee has removed certain misapprehensions and misunderstanding concerning the legal consequences of consent of the reversion to an alienation by a widow and has established the law. Thus in that case²⁷ their Lordships of the Privy Council said, "When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be entrusted to dispute the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one." Expressing their views with regard to the consent of the reversion to an

alienation by a widow in the case of *Kalishanker Das v. Dharendra Nath*⁹⁸ their Lordships of the Supreme Court pointed out, "When an immediate reversioner joins an alienation by way of a mortgage by a Hindu widow, the alienation being by way of mortgage, no question of surrender can arise. The immediate reversioner must be deemed to have consented to the transaction. Such consent may raise a presumption that the transaction was for legal necessity or that the mortgagee had acted therein with proper and bonafide enquiry and had satisfied himself as to the existence of such necessity. But this presumption is rebutted and it is open to the actual reversioner to establish that there was in fact no legal necessity and there has been no proper and bonafide enquiry by the mortgagee."

From the above mentioned observations we may deduce firstly that whereas normally consent implies personal acquiescence irrespective of impropriety of the conduct consented or assented to, in this context the consent provides the alienee with a presumptive proof which if not rebutted by a contrary proof will make the alienation valid.

As the concurrence of a reversioner raises merely a presumption it is open to the person disputing the alienation (i.e. remote reversioners) to show that there was no necessity for the alienation. The effect of the consent is therefore to shift the onus of proof, which originally was on the alienee, to the reversioner.⁹⁹

"Prior to this statement of the law", says S. V. Gupte, "The view was sometimes held that consent operated *proprio vigore* or consent itself validated an alienation and it was therefore not open to a reversioner, whether then in existence or not and whether he had himself consented to it or not, to question the alienation; in other words it was thought that consent of the reversioner conclusively established necessity. This view was based (apart from casual expressions in certain other decisions) upon the decision of the Privy Council in *Bajrangi's case*.¹⁰⁰ The Privy Council has held in *Rangasami's case* that *Bajrangi's case* did not lay down any such proposition,¹⁰¹ though certain observation in that case undoubtedly suggested it. The Privy Council in stating the real effect of consent said that the view that consent does not give force

per se though only tentatively expressed in Collector of Masulipatam v. Cavalry Venkata¹⁰² (where it was first mooted) was corroborated by much subsequent authority, such as Raj Lukhee v. Kokool Chunder¹⁰³ and other decisions".¹⁰⁴ (See also footnote 105.)

In the case of Rangasami v. Nachippa¹⁰⁶ reviewing the judicial opinion on the subject, the Judicial Committee has further laid down, "But further if the matter be considered on principle it seems clear that this must be the true view. For first if mere consent as such of the reversioner should validate an alienation, then the rule as to the total surrender would be an idle rule. And secondly mere consent could only validate on the theory that the reversioner together with the widow (limited heir) represented the whole estate. But that is impossible unless the reversioner has vested interest, whereas it is settled that he has only a *spes successionis*."

Similarly in the very recent case of Seetharamayya v. Sarna Chandrayya¹⁰⁷ where the plaintiff filed the suit as one of the next reversioners for partition and possession of his one third share in the properties of the last male holder after setting aside the alienations made by the widow of the latter, A. Subbarao, C.J. of Andhra High Court said, "During the lifetime of a widow a presumptive reversioner has only a *spes successionis* in the estate of the last male holder and he cannot, therefore, purport to convey the said interest or otherwise deal with it. His rights in the property would be crystalised only after succession opens. But after succession opens or even during the widow's lifetime, he may elect to stand by the transaction entered into by the widow or otherwise ratify it, in which case he would be precluded from questioning the transaction. But if the presumptive reversioner is a minor at the time he has taken a benefit under the transaction", his Lordship continued, "the principle of estoppel will be controlled by another rule governing the law of minors. A minor obviously cannot be compelled to take the benefit of a transaction which will have the effect of depriving him of his legal rights, when the succession opens. But a minor can certainly after attaining majority ratify a transaction entered into on his behalf by the guardian. If he so ratifies the transaction entered into by the guardian and accepts the benefit there-

under, there cannot be any difference in the application of the principle in action. The fact would be the same."

From the rulings of the aforesaid cases we may draw a conclusion that to hold otherwise would have been to lay down that the concurrence of some of the reversioners serve the purpose of raising an estoppel against all the reversion—a statement which was contrary both to principle and authority because no reversionary heir can be said to claim through or derive his title from another reversioner.¹⁰⁸

PROBLEM OF WITHDRAWAL OF ASSENT AND ALLEGED AFFECT OF CONSIDERATION

A further question has arisen namely whether the consent of the reversioner does not prevent him from impeaching the transaction if he took no consideration for giving his consent. The question that rose for consideration in the Privy Council in *Rangasami v. Nachiappa*¹⁰⁹ was whether a prospective reversioner who took a mortgage of a portion of a property from an alienee in whose favour the property was transferred by a widow, was estopped from disputing the validity of the alienation on the death of a widow. Dealing with this question Lord Dunedin said, "How can it be said that the plaintiff by any act of his, led the respondent to think that something was true and then to act on that belief? The learned Judges of the Appeal Court rest their opinion on the case of *Bajrangi Singh*. Their Lordships have already examined that case and stated what in their view is the true import of the judgment. But apart from that if *Bajrangi Singh's* case had been decided on the ground of estoppel, it affords no parallel to the present case. In that case all the reversioners in being had consented to the alienations. They were bound by their own consent and the *post nati* were held to claim through those that were bound. Here the plaintiff never consented to the deed nor is his claim traced through *Rangasami* even in the matter of descent¹¹⁰.

It is accepted as a rule that once a reversionary heir had given his concurrence he could not question the alienation at the time of an actual succession to the estate. But the *Andhra High Court* in *Subbareddi v. Govinda Reddi*¹¹¹ has taken a different view. There K. a Hindu widow, executed 'dakhala-

deed' in respect of certain land in favour of her daughter S. The plaintiff who was K's grandson from another daughter, was living with K. at the time of the execution of 'dakhla-deed' and the stamp-paper for the deed was also purchased in his name. The plaintiff attested the deed and was identifying witness at the time of its registration. Delivering judgment Unamaheswaram J. said, "A presumptive reversioner who assents to the alienation of the widow without receiving any consideration is not bound by the alienation apart from the doctrine of estoppel or election....."

This case has been contradicted on this point by the Supreme Court in *Sahu Madhu Das v. Pt. Mukunda Rama*.¹¹⁸ There their Lordships pointed out, "Where the plaintiff had assented to the arrangement with full knowledge of the facts and accepted benefit under it, he is precluded from avoiding it and any attempts he made to go behind that assent when it suited his purpose could not render the assent once given nugatory even though it was given when he was not *in titulo* and even though the assent was to the series of gifts."

With due respect we may say that the Andhra case is unsound. On principle it would seem that the validity of the transaction is unaffected by the taking or not taking of consideration, and that bonafide consent once given raises the presumption referred to by the Privy Council and subsequently by the Supreme Court.

RATIFICATION

On the question of ratification their Lordships of the Privy Council made the following observation: "No doubt there is another view which is not estoppel, but is expressed by one learned as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this.....an alienation by a widow is not a void contract. it is only voidable—*Bijoy Gopal Mukerji v. Krishna Mahaishi Debi*.¹¹⁹ Now in all cases of voidable contracts, there is a general equitable doctrine common to all systems that he who has the right to complain must do so when the right of action is properly open to him and he knows the facts. If therefore, a reversioner after he became *in titulo* to reduce the estate to possession and knew of the alienation, did something

which showed that he treated the alienations as good, he would lose his right of complaint. This may be spoken of though scarcely accurately as ratification. In some cases it has been expressed as an election to hold the deed good—*Madhu Sudhan Singh v. Rooki*".¹¹⁴ (See also footnote 115).

In the Full Bench case of *Fateh Singh v. Thakur Rukmini Rawanji*¹¹⁶ in the High Court of Allahabad, the majority opinion seems to have been based on ratification of election. *Wlash J.* basing his judgment on still wider grounds observed, "It does not matter whether it is called an estoppel, an election or equitable bar, we have to give effect to the acts and intentions of the parties as evidenced by their conduct unless prevented by some statute, or by some rule of law or equity".

A Full Bench case of the Bombay High Court in *Ramachandrappa v. Sayad Khan Mithi Khan*¹¹⁷ where the presumptive reversioner joined the widow in the execution of the deed, laid down that it amounted to a clear election to hold the transaction as valid. In other words where the reversioner approved of the alienation made by the widow, it was evident that the transaction was valid.

Again, a Full Bench Case of *Ramahotoyya v. Vira Raghavayya*¹¹⁸ in the Madras High Court may be mentioned in connection with the subject under discussion. There the plaintiff, the presumptive reversioner, executed a document completely relinquishing all the rights as prospective reversioner and giving full consent to the transaction, *Coutts-Trotter C.J.* found it difficult to rest his opinion either on the doctrine of estoppel or on the doctrine of election. For the sake of uniformity, however, he preferred the Full Bench decisions of Allahabad and Bombay High Court and evolved a third doctrine or formula on grounds of equity and expressed himself as follows: "Where although no one has been demnified, so as to call into operation the doctrine of estoppel and the reversioner has taken no pecuniary benefit to bring himself within the meaning of the strict doctrine of election, he has nevertheless positively and definitely chosen to announce his intention and in fact agreed to abide by the act of the widow." In the recent case of *Subhareddy v. Govindareddy*¹¹⁹, the Andhra High Court seems to have a different view. There, K. a Hindu widow, executed a *Dakhal* deed in respect of certain lands

in favour of her daughter S. The plaintiff, who was K's grandson from another daughter, was living with K at the time of the execution of the Dakhal deed and the stamp paper was also purchased in his name. The plaintiff attested the deed and was an identifying witness at the time of its registration. The relevant terms of the deed were as follows: "As the property, soon after the death of your father, passed into your possession towards (your) share and as there was no public document, you required me to execute a Dakhal-deed (conveyance deed). Therefore, you shall henceforth be paying Government costs etc. from now onwards and enjoy the property from now onwards from son to grandson with powers of sale, gift, mortgage and exchange. Neither myself nor my successors will question either you or your heirs. When you demand I am prepared to relinquish the Patha in my name and transfer it to your name. If in respect of this Dakhal-deed any dispute etc. arises, I shall see that this Dakhal-deed is given effect to." After the death of S. when succession opened, the plaintiff as a next reversioner brought a suit for possession of land against the defendant who claimed through a donee from S. Uma-maheswaram J. observed, "The facts of the case did not warrant the conclusion that the plaintiff positively and definitely announced his attention that the donee should take an absolute estate in the suit property or that he agreed to his grand-mother K, conveying an absolute estate to her daughter so as to ensure beyond her lifetime and bind the estate. As the alienation was not effective for legal necessity or benefit to the estate, the alienee was not entitled to an absolute estate. Viewed as a gift, not having been executed for purposes sanctioned by Hindu Law, it would not import an absolute title to the donee. There was no indication in the document that the widow K wanted to enlarge the estate of her daughter. The words that S might enjoy the property from son to grandson with powers of sale, gift, mortgage and exchange did not *per se* establish that she intended to convey an absolute estate to her daughter A transferee of a widow's estate is certainly entitled to continue in possession during the lifetime of the widow unless other contingencies like remarriage or adoption etc. take place. The interest conveyed to the transferee is not only transmissible to his heirs at

law but may also be sold, mortgaged, exchanged or gifted during the lifetime of the widow. Even assuming that the plaintiff by attesting the document was fully aware of all its terms, it did not amount to an unequivocal announcement of his intention to hold the deed good and that he would not recover the property from the donee or his successors after the death of the widow. Hence, the plaintiff was not stopped from recovering the suit property¹²⁰."

From the facts of the above mentioned case that the plaintiff attested the deed and was an identifying witness at the time of its registration, it is submitted, it is evident that the plaintiff has given his consent to the execution of the deed. In such circumstances consent implies personal acquiescence irrespective of the impropriety of conduct consented or assented to.

Further the learned judge said, "The plaintiff herein who attested the gift deed did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of the gift¹²¹."

We may say, it is submitted, that the law has laid down certain rules which generally govern the reversion either singly or as a body but has not laid down any special rule for a person who becomes a reversionary heir due to some contingency. Thus the law cannot offer some special privileges to the plaintiff in this case.

The subject was discussed by the Supreme Court in *Sahu Madho v. Mukand Ram*.¹²² There are properties in the four suits belonged to Nanak Chand who died on 23rd July 1856, leaving a widow P and three daughters M, D, and H. On his death his widow P succeeded. She died in January 1875 and the estate then went to the three daughters. Of them D died in 1881, M in 1912 and H in 1919. The plaintiff's rights as reversioner accrued on H's death in September 1919. But before this came certain alienation which the plaintiff challenged in the present suit. The plaintiff's case was that D only had a life estate and as there was no necessity, the mortgage and subsequent auction purchase did not bind him. Bose J. of the Supreme Court observed, "A family arrangement can, as a matter of law, be implied from a long course of dealings between the parties. Any title conveyed by a limited owner by gift or otherwise would not be void, it would only be void-

able. It would be good as against all the words except the reversioner who succeeded when the reversion opened out and he is the only person who would have the right to avoid it; and it would continue to be good until he chose to avoid it. Therefore, if he does not avoid, or is precluded from doing so, either because of the law of the limitation or by his own conduct, or for any other reason, then no one else can challenge it; and the law is that once a reversioner has given his assent to an alienation whether at a time or as a part of the transaction, or later as a distinct and separate act, he is bound though may not be, and having given his assent he cannot go back on it to the detriment of other persons, all the more so when he himself receives a benefit. Any attempt to go behind that assent cannot render the assent once given nugatory even though it was given when he was not in *titulo* and even though the assent was to a series of gifts¹²³."

CONSENT OF NEXT FEMALE REVERSIONER

An important distinction must be noted: Where the next reversionary heir is herself a female whose interest is the qualified one of Hindu widows, her concurrence to alienation will not bind the male reversioner who takes an absolute property. In *Bepin v. Durga* it has been laid down in Bengal that the consent of daughters to the sale of immovable property by the widow does not raise any presumption of law that the purpose for which the alienation was made was proper so as to pass an absolute and indefeasible estate to the alienee.¹²⁴

Giving reasons for the incompetency of a female heir's consent to raise a presumption, Mr. S. V. Gupte points out, "It was so held 'having regard to the state of dependence in which all women are supposed by the Hindu Law to have their being'. The concurrence, therefore, of a female, 'albeit the nearest in succession', cannot be regarded as affording the slightest presumption that the alienation was a justifiable one¹²⁵."

We may say that it is stated by Lord Dunedin in *Rangasami's* case that 'consent does not give force *per se* but is of evidential value—evidence that the alienation was under circumstances which rendered it lawful and valid'. Accordingly if the concurrence merely affords presumptive proof and not a

conclusive proof, how is the concurrence of the next woman reversioner sufficient to raise a presumption?

The position of a female reversioner, for instance a daughter or a sister etc. governed by the law of the Bombay state, where she takes an absolute estate, is different from the other female reversioners either in the Bombay State or other states of India where they acquire simply a qualified estate in inherited property. She is supposed to enjoy the same privilege as any male reversioner. The rule may be justified on the grounds, firstly, that she acquires an absolute and complete ownership in the property inherited by her, and secondly, she is no less a *spes successionis* than any male reversioner.

ALIENATION BY A WIDOW WITHOUT THE CONSENT OF REVERSIONARY
HEIR OR WITHOUT JUSTIFYING PURPOSES IS NOT VOID BUT
VOIDABLE

The alienation by a Hindu widow without the concurrence of the reversionary heirs or in the absence of any justifying necessity is not void but is voidable. The reason for the rule is that she is not a tenant for life but is owner of her husband's property subject to certain limitations on alienation, and subject to its descending on her husband's next heirs upon her demise. But she may alienate it subject to certain restrictions being complied with. Therefore her alienation is not entirely void but it is *prima facie* voidable at the election of the reversioner. He may think fit to ratify or he may at his pleasure avoid it.²²⁶

In *Ramgauda Aunagaud v. Bhausahab* in the Privy Council, Lord Sinha observed. "It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners, who may either singly or as a body be precluded from exercising their rights to avoid it either by express ratification or by acts which treat it as valid or binding²²⁷."

The Hindu Succession Act, 1956, puts women on a par with men in respect of enjoyment of property possessed by her. She is now as much an owner of her property as is a man of his property. Neither will the Hindu woman suffer any proprietary disability merely by reason of her gender, nor will her power of alienation of property be fettered by any rule or

custom. The only restriction which can exist in regard to her proprietary rights will not be due to any rule of law but because the giver of the property may want to give it to her subject to limitations. As by virtue of section 14 of the Hindu Succession Act, 1956,¹²⁸ the widow becomes full owner of the property inherited from her husband, she may alienate it by gift or, otherwise like any other full owner.

NOTES

¹ Vyavahara Mayukha, Ch. IV, sec. VII, P. 78 (Mandlik's Translation).

² Viramitrodaya : Trans. by G. C. Sarkar, Ch. III, Pt. I, Sec. III P. 141.

³ Smriti Chandrika Ch. XI, Sec. 1, 29.

⁴ History of Dharmasastra : by P. V. Kane, Vol. III, P. 474.

⁵ Dayabhaga, Ch. XI, I, 61—63.

⁶ This description of the Smriti author is no longer usual.

⁷ Principles of Hindu Law : W.H. Macnaghten, Vol. I (1829), pp. 19-20.

⁸ 1808. 1. S.D.A. REP. 261.

⁹ 1812. 2. S.D.A. Rep. 23.

¹⁰ 1815. East's Notes Case, 34.

¹¹ 1829. 4. S.D.A. Rep. 330.

¹² 1839. 2. M. I. A. 331.

¹³ 1839. 2. M.I.A. 331, (334, 335).

¹⁴ 1860. 8. M.I.A. 529 (550-551).

¹⁵ I. L. R., 4, All. 532 (541).

¹⁶ Bejoy v. Girindra, 1908. 8, C.L.J. 458.

¹⁷ 1922. 49, I.A. 342 (346).

¹⁸ Ravaneshwar v. Chandi Prasad, 1916, 43, C.A.L. 417 (P.C.).

¹⁹ 1909, 36, I.A., 138 ; other references ; Bhagwandas v. Mahadeo Prasad, 1923, 45, All. 390 ; Upendranath v. Kairan Chandra, A.I.R. 1926, Cal. 1046 ; Krishna v. Muthu Lakshmi, A.I.R. 1934, Mad. 169 ; Ram Asre Sing v. Ambica Lal, A.I.R. 1929, Pat. 216 ; Saraj Prasad v. Mt. Makhna Devi, I.L.R. (1945), All. 465 ; Devidayal v. Bhanupratap, 1904. 31, Cal. 433.

²⁰ Bhimardi v. Bhaskar, 6. Bom. L.R. 628.

²¹ Lalla Baijanath v. Rissen, 19. W.R. 80 ; Lakshman v. Radhabai, 1887, 11, Bom. 609 ; Jiban v. Brajolala, 1903, 30, I.A. 81 ; Srimohan v. Brijhebari, 1909, 36, Cal. 753 ; Rameswar v. Pravavati 1914, 19, Cal. W.N. 313 ; Ganeslal v. Khetaramohan, 1926, 53, I.A. 134 ; Jagannath v. Gureharan, 1929, 4, Luck. 279.

²² 1884. I.L.R., 10, Cal. 823 ; Gunap v. Subbi, 1908, 32 Bom. 577 ; Makkhan v. Gayan, 1911, 33, All. 255 ; Ramnyak v. Mt. Rupkali, A.I.R. 1934, All. 557.

²³ Sundermani Devi v. Rupei Dei, A.I.R. 1956, Orissa 16.

²⁴ 6, M.I.A., 393 (423).

²⁵ 1881, I.L.R., 6, Cal. 843 or 8, I.A., 8; see other cases: Lala Amarnath v. Acchan Kanwar, 1892, 19 I.A., 196; Sham Sundar v. Acchan Kanwar, 1898, 25, I.A. 183, Bhagawat Dayal v. Devi Dayal, 1908, 35, I.A. 48; Maheshar Baksh v. Ratan Singh, 1896, 23, I.A. 5. Boonomali v. Gagatchandra, 1905, 32 I.A., 80.

²⁶ 6, M.I.A. 393; see other cases: Khushi v. Meharchand, A.I.R., 1950, E.P. 272; P. Reddiar v. K. Pillai, 1950, Mad. 560.

²⁷ 6, M.I.A. 393.

²⁸ Amarnath v. Acchan Kuar, 1892, 19, I.A., 196; see other cases: O. Koudama v. Kondasami, 1924, 51, I.A., 145; R. R. Bali v. H. K. Bali, 1933, Luck. 538 (554-553); B. Chandra v. J. Kishore, 1915, 43, I.A. 249 (253); A. Ram v. Collector of Etah, 1918, 40, All. 171 (P. C.); S. P. Pillai v. Thirunamakarsu, A.I.R., 1951, Trav. 26; K. V. Rao v. D. V. Rao, 1956, Andhra, W. R. 1056.

²⁹ 1899, 25, I.A. 183; see other cases: R. R. Kissen v. N. Lal, 6, C.L.J. 490; M. Dalavoy v. Nairar, 1922, Cal. W.L., 365 (P.C.); O. Kondama v. Kandasami, 51, I.A. 145; U. Nath v. K. Chandra, A.I.R. 1926, Cal. 1046; M. Ammal v. Aburubammal, A.I.R. 1930, Mad. 688; Bhagwandas v. Bittan, 1945, I.L.R., All. 148; Mitthibai v. Koli Bai, A.I.R. 1955, N.U.C. 5936.

³⁰ Dharmchand v. B. Misrain, 25, Cal. 189 (P. C.); Anant v. Lala Rupnarain A.I.R. 1946, Nag. 9.

³¹ B. Gopal v. G. Nath, 1914 41, Cal. 793 (P.C.); see other cases: S. Nath v. B. Gopal, 1908, 13, C.W.N. 201; U. Nath v. Bindesri, 1915, 20, C.W.N. 210; Dayamoni v. Sirinibash, 1906, 33, Cal. 842; Sant Prasad v. C. Singh, A.I.R. 1951, Pat 539; S. Datta v. Akali, A.I.R. 1953, Pat. 374; J. Nath v. U. Dasi, A.I.R. 1955, Cal. 312.

³² Gunap v. Subbi, 1908, I.L.R. 32, Bom. 577; see other cases: Hurry v. Gonesh, 1884, 10, Cal. 823; Makhan v. Gayan, 1911, 33, All. 255.

³³ Sarupa v. Koral, 160, I.C. 632.

³⁴ A.I.R. 1928 All. 617: See other case: Haribhan v. Hakim, A.I.R. 1951, Nag. 249.

³⁵ Ramkumar v. Ichamoni, 1881, 6, Cal. 36; see other cases: H. Mohan v. G. Chunder, 1884, 10, Cal. 823, F.D.; D. Singh v. M. Ram, 1897, 19, All. 300; Shankar v. Ranghoba, 1938, I.L.R. Nag. 383; R. Joggya v. Nimushakari, 1910, 33, Mad. 492; D. Yeshwant v. M. Lal, 1936, 60, Bom., 311, F.B.; Parathnath v. Rameshwar, A.I.R., 1938, All. 491.

³⁶ Ramasami v. Selattamal, 1882, 4, Mad., 375: See other cases: Regella v. Nimushakari, 1910, 33, Mad., 492; D. Singh v. M. Ram, 1897, 19, All., 300; Mt. Kishen Devi v. Chandimal, A.I.R. 1934, All., 423.

³⁷ 1922, I.L.R., 44, All. 95.

³⁸ 1902, I.L.R., 26, Bom. 206; see other cases: Dhandu v. Misri Lal, 1936, 60, Bom., 311, F.B.; Popat Virji v. Damodar, A.I.R. 1934, Bom., 290; Pahalwan Singh v. Jiwandas, 1920, I.L.R. 42, All., 109; Barda Prasad v. Krishna Chandra, A.I.R., 1934, Cal. 414.

³⁹ I.L.R., 6, Cal. 843.

⁴⁰ 1899, 25, I.A., 183.

⁴¹ Rameshwar Mandal v. P. Debi, 1914, 19, C.W.N., 313, 319. See other cases; Vasanji v. Chandabibi, 1915, I.L.R. 37, All., 369, P.C.; Jainarain v. Collector of Aligarh, A.I.R. 1942, All. 184.

⁴² R. Mandal v. P. Debi, 1914, 19, C.W.N. 313; See other cases: S. G. Mean v. T. Pauchanan, 1936, 15, Pat, 798; Dhondu v. Mishri Lal, 1936, 60, Bom. 311, F.B.; Overruling, 1879, 3, Bom., 237, and 1928, 52, Bom. 542; Radappa v. Balappa, A.I.R. 1938, Nag. 77.

⁴³ 1881, 5, Bom. 450, 460. See other cases: Ramsunran Prasad v. Shyam Kumari, 1922, 49, I.A. 392; Darbarilal v. Govind Saran, 1924, 46, All., 822.

⁴⁴ A.I.R., 1943 Bom. 266, 267.

⁴⁵ A.I.R., 1953, Mad. 238.

⁴⁶ 1956, 1 M.L.J., 245.

⁴⁷ A.I.R., 1925, Mad. 1122.

⁴⁸ 1925, 50, M.L.J., 234.

⁴⁹ A.I.R., 1943, Bom. 266.

⁵⁰ A.I.R., 1953, Mad. 238.

⁵¹ 8, M.I.A., 529.

⁵² Ibid, See other cases: Shripati Raoji v. Vishwanath, A.I.R. 1955, Bom. 457; Vishwanth v. Narayan, A.I.R. 1935, Nag. 217; Parthasarathi Nayagar v. Gurulinga, A.I.R. 1955, Nuc. 3894.

⁵³ Vyavastha Darpana by S. C. Sarkar (1867), pp. 101-102.

⁵⁴ B. K. Mukherjee: The Hindu Law of Religious and Charitable Trusts, P. 4.

⁵⁵ Sardar Singh v. Kunjabihari Lal, 1922, 49, I.A., 383, 391; approving Tatayya v. Ramakrishnamva, 1911, 34, Mad. 288; and the judgment of Mookerjee, J. in Khublal v. Ajadhya, 1916, 43, Cal. 574.

⁵⁶ Sardar Singh v. Kunj Behari Lal, 1922, 49, I.A. 383; see other cases: Kunj Behari Lal v. Laltu Singh, 1919, I.L.R. 41, All. 130; Tatayya v. Ramakrishnamma, 1911, I.L.R. 34, Mad. 288; Khub Lal v. Ajadhya 1916, I.L.R., 243, Cal. 574. The payment of the owner's debts falls within the first category of religious acts and the widow or any other limited family heir may sell even the whole estate for that purpose; Ashutosh v. Onidam, 1930, I.L.R. 57, Cal. 904.

⁵⁷ Sardar Singh v. Kunj Behari Lal, 1922, 49, I.A. 383, 391. See other cases: Panachand v. Manohar Lal, 1918, I.L.R. 42, Bom. 136; Kunj Behari Lal v. Laltu Singh, 1919, I.L.R. 41, All. 130; Thakur Indraj Bux v. Thakur Sheo Naresh, 1927, I.L.R., 2, Luck. 713; Sohan Lal v. Mt. Bhagawati, A.I.R. 1936, All. 205; Debi Dayal v. Radha Kishan, 1939, 14, Luck. 594.

⁵⁸ Hindu Law in British India by S. V. Gupte (1947), First Ed. p. 645.

⁵⁹ I.L.R. 1951, Nag. 284. See other cases: Mt. Tulsa v. Lachman Prasad, 1942, I.L.R. 18, Luck. 501.

⁶⁰ Mutteeram Kowar v. Gopal Sahoo, 11, B.L.R., A.I.R. 1952, All. 938; Maniruddin v. Aminullin, 416. See other cases: Darbari Lal v.

Govind, 1924, 46, All. 822 ; Gur Prasad v. Ramsukha, A.I.R. 1956, Pat. 142

⁶¹ I, W.R. 252 ; Hari v. Bajrang, 1909, 13, C.W.N. 544.

⁶² A.I.R. 1928, Bom. 238, 239.

⁶³ A.I.R. 1938, All. 100, 102.

⁶⁴ History of Dharmasatra, by P. V. Kane, Vol. IV, P. 569.

⁶⁵ A.I.R. 1955, Bom. 457.

⁶⁶ A.I.R. 1955, Bom. 457, 458.

⁶⁷ Dayabhaga, Ch. XI-Sec. I, 61.

⁶⁸ Chowdary, Junmenjoy v. Rosmayee, 10, W.R. 309.

⁶⁹ *Alienations by a widow* : Rajchunder v. Sheehon, 1865, 7, W.R. 146 ; Ram Coomar v. Ichayi, 1882, 6, Cal. 36 ; Latur Rai v. Bhagawandas, A.I.R. 1936, Pat. 80 ; Lakshminarayan v. Dasu, 1888, 11, Mad. 288 ; Ratachanda v. Jhaver Chand, 1898, 22, Bom. 618 ; *Alienation by the daughter* Srimohan v. Braj Behary, 1908, 36, Cal. 753 ; Tatayya v. Ramakrishna, 1911, 34, Mad. 288 ; Nabinchandra v. Sona Mala, 1930, 35, C.W.N. 279 ; *Alienation by a daughter-in-law* : Bharu v. Gopala, 1887, 11, Bom. 325.

⁷⁰ Ramakeval v. Ramakrishore, 1895, 22, Cal. 506 ; see other cases : Bisen Dayal v. Mt. Jaisari Kaur, A.I.R. 1916, Pat. 323 ; Shamdei v. Birbadra, 1921, 43, All. 453 ; Munshilal v. Shev Devi, 1923, 4 Lah. 336 ; Thakur Prasad v. Mt. Dipa Kaur, 1931, 10, Pat. 352.

⁷¹ Manu. IX, 96.

⁷² Brihaspati, XXV, 46.

⁷³ Rabidat v. Mt. Jawali, 1946, 27, Lah. 580, 661 ; Prabhala Krishnamurthi v. V. Lingayya, A.I.R. 1936, Mad. 677 ; Thakur Prasad v. Mt. Dipa Kaur, 1931, 10, Pat. 352 ; Khublal v. Ajodhya Misser, 1916, 43, Cal. 574, 582.

⁷⁴ Bhalu v. Parbu, 1872, 2, Bom. 67 ; See other cases : Chimnaji v. Dinkar 1887, 11, Bom. 320 ; Bhau Babaji v. Gopala, 1887, 11, Bom. 325 ; Kondappa v. Subba, 1890, 13, Mad. 189 ; Udaichandra v. Ashutosh, 1893, 21, Cal. 190 ; Gaurishankar v. Shivanandan, 1924, 46, All. 384, 388 ; Gajadhar v. Jagannath, 1924, 46, All. 775 785, F.D. ; Santu Ram v. Mt. Dodam Bai, 1928, 9, Lah. 85 ; Tulsi Prasad v. Jagmohan Lal, A.I.R. 1934, All. 1048 ; Korini Raja Rao v. Korini Chiranjeevelu, 1954, Cal. 588 ; Ratan Dvi v. Jagadhar Mal, A.I.R. 1956, Pub. 44.

⁷⁵ Devi Dayal v. Bhanpratap, 1904, 31, Cal. 433 ; Makhan v. Gayan, 1911, 33, All. 255 ; Ganpat v. Tulsi Ram, 1912, 36, Bom. 88 ; Bhagawati v. Ramjatan, 1923, 45, All. 297 ; Mahadeo v. Mt. Dhanraj, 1926, 1, Luck. 477 ; Brijmohan v. Mt. Racchpal, A.I.R. 1933, Oudh. 426 ; Japbhu v. Parshottha Ram, A.I.R. 1953, H. P. 84, (marriage of a girl brought up by the husband as her daughter) ; Parisa v. Nataraja, I.L.R. 1950, Mad. 788 ; P. B. Krishnamach v. G. M. Ramabadram, I.L.R. 1952, Mad. 318.

⁷⁶ Ramasami v. Vengiduswami, 1898, 22, Mad. 113 ; see other cases : Churaman Sahu v. Gopee Sahu, 1910, 37, Cal. 1 ; Jawala Ram v. Hari Kishen, 1924, 5, Lah. 70 ; Ram Sumran v. Govind Das, 1926, 5, Pat. 646 ; Brij Mohan v. Mt. Racchpal Kuor, A.I.R. 1933, Oudh. 426.

⁷⁷ A.I.R. 1957, Supreme Court, 434, 443.

⁷⁸ 1956, Andhra, W. R. 919, 922.

⁷⁹ 1861, 8, M.I.A. 529, 551.

⁸⁰ 1869, 13, M.I.A. 202.

⁸¹ I.L.R. 6, All. 116, F.B.

⁸² I.L.R. 10, Cal. 1102, F.B.

⁸³ I.L.R. 10, Cal. 1102, F.B.

⁸⁴ 1891, 19, I.A. 30.

⁸⁵ Marudamathu v. Srinavasa, 1898, 21, Mad. 128, F.B.

⁸⁶ 1901, 25, Bom. 129.

⁸⁷ Ibid. p. 133.

⁸⁸ At this point the learned Chief Justice quotes a text of Narada cited in Dāyabhāga, XI, I, 64, and a text of Jimūtahana, "In the disposal of property by gift or otherwise she is subject to the control of her husband's family after his decease and in default of sons."

⁸⁹ 1918, 35, I.A. 1; Approving Radha Shyam v. Joyram, 1890, 17, Cal. 896. Sham Sunder v. Acchal Kanwar, 1896, 25, I.A. 183; Vinayaka v. Govind 1901, 25, Bom. 129; Debi Prasad v. Golap-Bhagat, 1913, 40, Cal. 721; F.B. Bijoy Gopal v. Garindra Nath, 1914, 41, Cal. 793, P.C.

⁹⁰ 1869, 13, M.I.A. 209.

⁹¹ Radha Shyam v. Jayaram, 1890, 17, Cal. 896.

⁹² Pulin Chandra v. Boli Mandal, 1908, 35, Cal. 939; see other cases: Anhada Kumar Roy v. Indra Bhusan Mukhopadhyaya, 12, C.W.N. 49.

⁹³ Marudamathu v. Shrinivasa, 1898, 21, Mad. 128, F.B.

⁹⁴ 1908, 31, Mad. 366, F.B. See other cases: Muthuveeru v. Vythilinga, 1909, 32, Mad. 206.

⁹⁵ 1908, 35, I.A. 1.

⁹⁶ 1919, 46, I.A. 72.

⁹⁷ Ibid. p. 84; approving the rules laid down by Jenkins C. J. and Mookerji J. in Debi Prasad v. Golap Bhagat, 1913, 40, Cal. 721.

⁹⁸ A.I.R. 1954, S.C. 505, 509.

⁹⁹ Inderjit v. Jadd, 1933, 55, All. 157; see other cases: Ramamurthy v. Bhimshankarran, I.L.R. 1938, Mad. 688; Ramesh Chandra v. Sasi-bhusan, 1919, 30, Cal. L.J. 56; Satyanarayan v. Venkanna, 1933, 65, M.L.J. 282; Thimmanna v. Ramadhatta, A.I.R. 1938, Mad. 300.

¹⁰⁰ 1908, 35, I.A. 1.

¹⁰¹ 1919, 46, I.A. 72, 83.

¹⁰² 1868, 8, M.I.A. 529.

¹⁰³ 1869, 13, M.I.A. 209.

¹⁰⁴ Shamsunder Lal v. Acchan Kunwar, 1898, 25, I.A. 183; Debi Prasad v. Golap Bhagat, 1913, 40, Cal. 721, F.B.; Bijai Gopal v. Girindra Nath, 1914, 41, Cal. 793, P.C.; Vinayak v. Gobind, 1901, 25, Bom. 129.

¹⁰⁵ Hindu Law in British India, 2nd Ed. p. 669.

¹⁰⁶ 1919, 46, I.A. 72, 84.

¹⁰⁷ A.I.R. 1955, 68, 72-73; other cases: Ramaswami v. Arumanyagam, A.I.R. 1955, Trav.-Co. 20.

¹⁰⁸ Bhagwanta v. Sukhi, 1900, 22, All. 33, F.B.; other cases: Bahadur

Singh v. Mohan Singh, 1901, 29, I.A. 1 ; Lala Soniram v. Kanhaiya Lal, 1913, 40, I.A. 74 ; Srimurthy v. Haripada, 1914, 18, C.W.N. 718 ; Ramasami v. Nachiappa, 1919, 46, I.A. 72, 83-84.

¹⁰⁹ 1919, 46, I.A. 72 or A.I.R. 1918, P.C. 196.

¹¹⁰ 1919, 46, I. A. 72, or A.I.R. 1918, P.C. 202.

¹¹¹ A.I.R. 1955, Andhra, 49.

¹¹² A.I.R. 1955, S.C. 481.

¹¹³ 34, I.A. 87.

¹¹⁴ 24, I.A. 164.

¹¹⁵ 1919, 46, I.A. 72.

¹¹⁶ A.I.R. 1923, All. 387, F.B.

¹¹⁷ A.I.R. 1927, Bom. 260, F.B.

¹¹⁸ A.I.R. 1929 Mad. 502, F.B.

¹¹⁹ A.I.R. 1955, Andhra, 49.

¹²⁰ A.I.R. 1955, Andhra, 49, 51-52.

¹²¹ Ibid. 53.

¹²² A.I.R. 1955, S.C. 481.

¹²³ A.I.R. 1955, S.C. 481 ; or 1955, 18, S.C.J. 417, 429.

¹²⁴ 1908, I.L.R. 35, Cal. 1086 ; followed in Hari Dasi v. Bibukhi, 1922, 35, Cal. L.J. 66.

¹²⁵ Hindu Law, P. 666.

¹²⁶ Bijoy Gopal v. Krishna, 1907, 34, I.A. 87 ; see other cases : Kandamat Naicker v. Kandasamy Gounder, 1924, 51, I.A. 145 ; Madhu Sudan v. Rooke, 1897, 25, Cal. 1 ; Dy. Commissioner of Kheri v. Khanjan, I.L.R. 29, All. 331, P. C. ; Hayes v. Harender Narain, 1904, I.L.R. 31, Cal. 698 ; Kashirao Bhagnji v. Motaram Mudgabi, I.L.R. 1951, Nag. 284.

¹²⁷ 1927, 54, I.A. 396, 402 ; other cases : Sivanancha Perumal Pillai v. Thirunamaharasu Pamdaram, A.I.R. 1931, Trav. Co. 26 ; Sahu Madho Das v. Mukhand Ram. A.I.R. 1955 S.C. 481.

¹²⁸ Section 14 of the Hindu Succession Act, 1956, runs as follows :—

“(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation :—In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property.”

CHAPTER IV

THE WOMAN'S RIGHT OF SURRENDER

The word 'surrender' has been defined in the following terms : "An assurance restoring or yielding up an estate, the operative verbs being 'surrender and yield up'. The term is usually applied to the giving up of a lease before the expiration of it ; it generally means the giving up of a lesser estate to a greater ; a release is the giving up of a greater to a less interest, enlarging the latter. The effect of a surrender is to pass and merge the estate of the surrenderer to, and into, that of the surrenderee."¹

ORIGIN OF THE DOCTRINE OF SURRENDER

It is necessary to enquire at the outset, whether the doctrine of surrender by a Hindu widow of her husband's estate for the time being is one which finds a place in the texts of Hindu law. Expressing his views with regard to the foundation of the doctrine Mr. J. R. Gharpure says, "The whole doctrine of surrender is a creation of judicial decisions. It is unknown to Hindu Law."² In the case of Vaidya Nath vs. Savithri, Kumaraswami Sastri, J. of the Madras High Court pointed out that the whole doctrine of surrender and consequent acceleration of the reversion has no basis in Hindu Smritis but has evolved by Court of Justice on general principles of jurisprudence³. But quoting the relevant texts, Sir Asutosh Mookerjee, J. in the Full Bench case of Debi Prasad vs. Golap Bhagat, held that the theory of surrender or relinquishment finds support in the ancient Smritis. They are the texts of Katyayna, Vyasa and Narada cited by Jimutavahana in the *Dayabhaga*⁴.

Firstly, Katyayana points out : "Let the childless widow, preserving unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death. After her let the heirs take it." Secondly, it is observed in the *Mahabharata* : "For women, the heritage of their husband is pronounced applicable to use. Let not

women on any account make waste of their husband's wealth?" Finally Narada says, "When the husband is deceased, his kin are the guardians of the childless widow. In the disposal of the property and care of herself, as well as in her maintenance they have full power. But if the husband's family be extinct or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a *sapinda*."⁸ Besides these another text⁹ may be mentioned, wherein the author of the *Dayabhaga* observes that the persons who would be next heirs on failure of prior claimants, succeed to the residue of the the estate remaining after her use of it, upon the death of the widow in whom the succession had vested in the same manner as they would have succeeded if the widow's right had never taken effect. As the words 'if when her right ceases' (or if it had never taken effect) are comprehensive enough to include also cases of termination of tenure other than death, it has been held that the principle of surrender has been prefigured by the author of the *Dayabhaga*.

It is submitted that the texts quoted by Jimutavahana in the *Dayabhaga* are vague and ambiguous. Not to speak of the modern doctrine of surrender as a whole, they do not even give any specific indication of an essential requisite of surrender.

In the case of *Natvar Lal Punjabbai vs. Dadubhai Mamubhai*¹⁰ discussing this point B. K. Mookerjee, J. of the Supreme Court says: "The law of surrender by a Hindu widow, as it stands at present, is for the most part judge-made law, though it may not be quite correct that there is absolutely no textual authority upon which the doctrine could be founded, at least impliedly. So far as the *Dayabhaga* law is concerned, its origin is attributed to Jimutavahana's commentary on the well-known text of Katyayana, which describes the interests of a childless widow in the estate left by her husband and the rights of the reversioners after her death."

His Lordship continues, "While commenting on Katyayana's text, Jimutavahana lays down that the persons who should be the next heirs on failure of prior claimants, would get the residue of the estate after her use on the demise of the widow in whom the succession is vested, as they would have

succeeded if the widow's rights were non-existent or destroyed (in other ways)."

Suba Rao, C. J. of the Andhra High Court considering this question in a recent Full Bench case of *Rami Reddi vs. Atla Rasamma*¹¹ points out: "Though Jimutavahana indicates that the right may be destroyed in other ways, he does not expressly state, as I have already pointed out, that a surrender is one of the modes by which her estate can be put an end to. In any view, even if the doctrine can impliedly be gathered from the commentary of Jimutavahana, the incidents of the surrenders are not laid down in any of the texts. The decisions of the various High Courts and those of Judicial Committee evolved the theory of surrender."

From all this discussion it is concluded that the doctrine of surrender is a product of the decisions of the Privy Council and of the Courts in India.

Commenting on the concept of surrender in English Law, B. K. Mukherjee said: "The word 'surrender' cannot be said to be free from ambiguity. If it connotes nothing more than the English doctrine of merger and a Hindu widow, whose interest is usually though incorrectly likened to that of a life tenant¹² under the English Law, merely accelerates the reversion by surrendering her limited interest in favour of the reversioner; undoubtedly no surrender can be effective if the widow has already parted with her interest in the property by a voluntary act of her own or her rights wherein have been extinguished by adverse possession of a stranger. The English doctrine of merger, though it may have influenced some of the judicial pronouncements, has really speaking no application to a Hindu widow's estate, as it stands at present, is for the most part judge-made law, though it may not be quite correct to say that there is absolutely no textual authority upon which the doctrine could be founded, at least impliedly." His Lordship continued, "But though certain terms and expressions of English Law have been made use of in a somewhat loose sense, yet the radical idea involved in the doctrine of surrender by a Hindu widow is totally different from what is implied in the merger of a life interest in the reversionary estate under the English Law. In English Law the reversioner or remainder man has a vested interest in the property and

his rights are simply augmented by the surrender of the life estate. In Hindu Law, on the other hand, the widow, so long as she is alive, fully represents her husband's estate, though her powers of alienation are curtailed and the property after her death goes not to her but to her husband's heirs. The presumptive reversioner has got no interest in the property during the lifetime of the widow. He has a mere chance of succession which may not materialise at all. He can succeed to the property at any particular time only if the widow dies at that very moment".¹³

JUDICIAL DECISIONS

Proceedings to the judicial decisions on the subject we may say that the earliest case that we have been able to discover is *Pratab Chandra vs. Joymoni*¹⁴, where Trevor and Campbell, JJ. said: "We think it admits of no reasonable doubt that under the Hindu Law, a Hindu lady in possession can relinquish and by relinquishing anticipate for the reversioners their period of succession."

The first paramount authority bearing on the doctrine of surrender is the case of *Behori Lal v. Madho Lal Gyayal*¹⁵ wherein a Hindu died leaving behind a widow, two daughters and a grandson by one of them. The widow, who succeeded to the estate of her husband, executed in favour of the said grandson, then the apparent reversionary heir, an *ikrarnamah* which provided that she was to retain the estate for her life and that the said grandson was to enter upon the estate and convey the same after her death. Lord Morris in delivering the judgment of the Judicial Committee in that case explained the theory of relinquishment in these words, "It may be accepted that according to Hindu Law the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate. It was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee".¹⁶

The scope of the doctrine of surrender has been more elaborately explained in the decision of their Lordships of the Judicial Committee in *Rangaswami Goundan vs. Nachappa Goundan*.¹⁷ Commenting upon the case of *Behari Lal vs. Madho Lal*¹⁸, they say, "that this was no new doctrine but

was only the final sanction of a long series of decisions, may be taken from the opinion of Garth, C.J. and Mitter J. in *Nobokishore vs. Hari Nath Sarma Ray*¹⁹, which had been decided six years before *Behari Lal's case*."

"It has been suggested that the expressions in *Behari Lal's case* only meant that the widow should retain no interest in what was surrendered, and that therefore a partial surrender provided that the surrender was absolute as to that part was valid. This, however, is quite against the principle on which the whole transaction rests." Their Lordships further observed: "It is the effacement of the widow and an effacement which in other circumstances is affected by actual death or civil death—which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so".²⁰

One may say that surrender by a widow is not an alienation of any kind. It is merely a relinquishment of an interest which the next reversioner takes in his own right, and not as a conveyance from the widow. The essence of the transaction is a bona fide completed abandonment of all interests in the entirety of the property by the widow.

DISTINCTION BETWEEN SURRENDER & ALIENATION FOR LEGAL NECESSITY

In order better to understand this doctrine it is considered necessary to mention the case of *Nobokishore vs. Hari Nath Sarma Roy*, where the Full Bench of the Calcutta High Court held: "A transfer or conveyance by a widow upon the ostensible ground of legal necessity, such transfer or conveyance being assented to by the person who at the time is the next reversioner, will conclude another person not a party thereto, who is the actual reversioner upon the death of the widow, from asserting his title to the property".²¹ Delivering judgment, Sir Richard Garth, C.J. of the Calcutta High Court in that case said, "If it is once established, as a matter of law, that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may thus agree to make".²²

One may comment that the learned Chief Justice himself

felt considerable doubt as to the correctness of this principle. He was, however, swayed by the consideration that this principle had been accepted by the Calcutta High Court for many years past and they adopted the principle more on the ground of *stare decisis*. It may be further said that this view overlooks the facts that the rights of the reversioner who gives consent at the time of the alienation are no better than *spes successionis*, and the assumption that the widow and the consenting reversioners represent the whole of the estate is not legally sound. As a matter of fact in that case, the alienation was justified by legal necessity and the observations as to surrender are obiter.

Another Full Bench case of *Debi Prasad vs. Golap Bhagat*²³ of the same High Court may also be referred to which embodies an erudite discussion of our question. Although the actual question in that case was whether an alienation by way of mortgage by a Hindu widow of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, would be valid and binding on the actual reversioner, who is not the heir of the consenting party, yet the entire subject was reviewed. Sir Asutosh Mookerjee, J. summarising the legal position laid down the following propositions:

- (1) When a Hindu Widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title against the reversionary heir after her death, if he proves that the alienation was made by her for purposes of legal necessity.
- (2) When a Hindu widow has alienated, in whole or in part, the estate inherited by her from her husband, the transferee can establish a good title as against the reversionary heir after her death, if he proves that he made proper and *bona fide* enquiries as to the actual existence of the legal necessity and did all that was reasonable to satisfy himself as to the existence of such necessity.
- (3) When a Hindu widow has alienated, in whole or in part, the estate inherited by her husband, with

the consent of the reversionary heirs, such consent may raise the presumption that the transfer was for legal necessity or that the transferee had made proper and bona fide enquiries and had satisfied himself as to the existence of such necessity. To raise this presumption depends upon the facts of each particular case, and, in all cases, the presumption raised by such concurrence on the part of the reversioners is rebuttable.

- (4) When a Hindu widow has alienated her entire interest in the estate inherited by her from her husband, with the consent of the whole body of persons entitled to succeed as immediate reversionary heirs, the transferee acquires a good title as against the actual reversionary heirs at the time of her death".²⁴

Commenting upon the fourth proposition laid down in *Debi Prasad vs. Golap Bhagat*, Suba Rao, C. J. of the Andhra High Court said : "I find it difficult to appreciate the principle behind the fourth proposition laid down by the learned judge. Indeed, the learned Judge himself in the course of his judgment finds it difficult to sustain it on principle but accepts it as settled by previous decisions, particularly that of *Nobokishore vs. Harinath*".²⁵

His Lordship further observed in *Debi Prasad's* case: "If the matter were *res integra* I would without hesitation adopt the view that the sale by the widow of the entire inheritance to the then immediate reversioner does not possess the characteristics of a real relinquishment by her, as contemplated by Hindu Law-givers. A widow, who transfers the property for a consideration or retains an interest in the purchase money, cannot by any stretch of language, be deemed to have relinquished her interest in the estate of her husband; the estate by her action has, in essence, only undergone a transformation and the immoveable property has been converted into money, which may be shuffled out of sight as land never can be".²⁶

One may comment that if the transfer of the whole property in favour of the reversionary heir for consideration did not, on this view of the law, hold good an alienation by a widow in favour of a third party with the concurrence of the

reversionary heir would not be a better position. In that case also the widow would only be converting immoveable property into cash. The transaction can only be justified on the ground that the widow and the reversionary heir together represent the estate and both of them can transfer it in favour of a third party—a proposition which can hardly hold good when the presumptive or apparent reversioner cannot satisfy the requirement of being the one to take on her interest in ceasing, since her interest has not ceased when she enters into the agreement in question.

But it is legally recognised, as mentioned above, that a reversionary heir has no interest except a *spes successionis* and that the widow alone represents the whole estate. The subject was dealt with more comprehensively by the Judicial Committee in *Rangaswami vs. Nachiappa Goundan*.²⁷ In that case the mother of the deceased last male holder executed a deed of transfer to one Rangaswami Goundan, a nephew of her late husband, who was then the next reversionary heir to her son. The transferee enjoyed the properties under the deed till his demise, when they passed to his nephew, defendant 1. The appellant who was an actual reversionary heir along with the defendants (1) filed the suit for recovery of his share in the property. The suit was decreed. In that connection their Lordships reviewed the whole law on the question and defined it in these words, "(1) An alienation by a widow of her deceased husband's estate held by her, may be validated if it can be shown to be a surrender of her whole interest in favour of the next reversioner or reversioners at the time of the alienation. In such circumstances, the question of necessity does not fall to be considered. But the surrender must be a bona fide surrender and not a device to divide the estate with the reversioner. (2) When an alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by a contrary proof, will validate the transaction as a right and proper one."²⁸

With respect it may be said that the destruction of her

life estate is the first and the essential act of surrender, the conveyance of the property to the reversioner is its inevitable consequence. In other words, the doctrine of surrender as it has now been evolved by the Courts postulates her voluntary effacement by the widow. It amounts to her civil death, and naturally the consequences of such civil death is that the property seeks for its next heir.

It is manifest from the above-mentioned observations that the Privy Council made a clear distinction between a surrender and an alienation for necessity. The widow should relinquish her whole interest in the entire property in favour of the nearest reversionary heirs and it should be bona fide in the sense that it is not a device to divide the estate. If the widow and the next reversioner collusively divide the estate by agreement, it will be a division between the widow and the next reversionary heir who has only a *spes successionis* in the estate. On the other hand it will prove harmful for remote reversioners. So far as an alienation is concerned, they observed that the concurrence of the reversioners is only a presumptive proof of necessity.

Referring to the case of *Nobokishore vs. Hari Nath Sarma Roy* their Lordships of the Privy Council points out : "The judgment went upon the principle of surrender and it might do so for the surrender there was of the whole estate, but it is worthy of notice that the order of reference showed that the alienation was ostensibly on the ground of necessity, so that it might have been supported on the grounds to be mentioned under the second head above set forth".²⁹

The Judicial Committee repeated the same rule in the subsequent decisions. In *Mt. Bhagwat Koer vs. Dhanukdhari Prasad Singh*,³⁰ their Lordships observe : "In that case it was settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from succession as effectively as if she has then died. The voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights, and it may be effected by any process having that effect, provided that there is a bona fide and total renunciation of the widow's right to hold the property."

Their Lordships of the Privy Council further state : "It is true that the documents were drawn up on the footing, not of a surrender of an acknowledged right, but of an admission that the right did not exist, but in substance and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate".³¹

It is, therefore, apparent that once there is an absolute abandonment of the widow's right to hold the property, the substance of the transaction, not its form is the true criterion.

INTERPRETATION OF THE TERM "A DEVICE TO DIVIDE THE ESTATE"

Reiterating the same principle again in *Sureshwar Misser vs. Mt. Maheshrani Misrain*, Lord Dunedin on behalf of the Judicial Committee said that firstly, the surrender must be total, not partial ; secondly, it must be bona fide surrender and not a device to divide the estate with the reversionary heirs.³²

Their Lordships of the Privy Council proceeded further to explain the words "a device to divide the estate" as follows :

"Now their Lordships do not doubt that to make an arrangement for such a device, it is not necessary that the lady surrendering should take part of the property directly. An arrangement by which the reversioner as a consideration for the surrender promised to convey a portion of the property to a nominee or nominees of the lady surrendering, might well fall under the description of a device to divide the estate. It is here that the fact of the arrangement being a compromise becomes of importance".³³

This judgment of the Judicial Committee, therefore, is considered to be an eminent authority for the rule that a device to divide the estate need not essentially be between the reversionary heir and the widow, or between the reversionary heir and a third party who is a *benamdar* for, or nominee of the widow. But the words are exhaustive enough to comprise a device to divide the estate between the reversionary heir and the nominee of the widow, though the widow does not acquire any advantage under it.

If the second arrangement referred to in the judgment

was designed to refer only to an arrangement to divide the estate between the reversionary heir and the *benamdar* for the widow, the words 'might well fall under the description of a device to divide the estate' would not be suitable because in every case such an arrangement could come under the main head. The rules can, beyond any doubt, be justified on principle.

The surrender by a widow to be valid shall be in favour of the next reversionary heir or reversionary heirs. It opens the gates for the whole succession. If a device is availed of, giving to the next reversionary heir a portion only of the whole property of her 'last male holder', it will counter the purpose of the surrender itself. Though the widow may in legal sense tend to efface herself, the succession does not, in fact, open out in respect of the whole estate, and thus it does not open at all.

In the case of *Marudamuthu Nadan v. Srinivasa Pillai*,³⁴ decided by Full Bench of the Madras High Court in 1898, Subramania Ayyar, J. says : "I think it unnecessary to go into the question whether the Hindu law, according to the texts of the commentaries, leads support to the doctrine that a female holding a qualified estate can validly surrender such an estate so as to entitle the then immediate reversioner to enter upon the inheritance and to hold it absolutely as if the succession had opened by the natural or civil death of the qualified owner. Though there has been no course of decisions on the point in this Presidency as in Bengal, yet instances have occurred which showed that parties have acted upon the view that such surrenders are valid in these parts as well. This appears even from some of the cases which have come before the Court. Since there is nothing in the doctrine itself which makes it less suited to the community in this Presidency than to the community in Bengal, it is not surprising that the Calcutta rulings have in practice been followed in this Presidency also. In such circumstances, the rule, as stated by the Judicial Committee in *Behari Lal vs. Madho Lal*³⁵ should, I think, be taken to be a rule applicable to this Presidency too, subject, no doubt, to the restriction pointed out by their Lordships, viz. that the surrender should be absolute and complete and that the whole limited estate should

be withdrawn, a restriction that would guard against the injurious results which would follow if the rule were not so qualified." The injurious results which could follow, in our opinion, are collusive division of the property between the widow and the next heir, which would defeat the rights of remote heirs who have *spes successionis* in the property.

In the case of Subbiah *vs.* Pattabhiramayya, where a widow conveyed the whole of her limited estate to the next reversioner in consideration of an undertaking by the reversioner that he would reconvey a portion of such property to a person named by the widow, it was held that the surrender was valid.³⁶ This was the decision delivered prior to the rulings of the Privy Council in Rangaswami *vs.* Nachiappa.³⁷ On the facts of the case it is obvious that the arrangement was undoubtedly a device to divide the estate between the reversioners and the nominee of the widow. We may say that the decision in that case would have been entirely different if it had been dealt with after the rulings of the Judicial Committee.

A similar case came before the Madras High Court after the rulings of the Judicial Committee in Rangaswami's case where a widow gifted all the immoveable properties left by her husband in equal shares to her own sister's son and the son of one of the husband's brothers keeping for herself a right to enjoy a small portion for her maintenance and got a deed from her husband's brothers, releasing their reversionary right in favour of the donee and gave in consideration therefore a pronote for Rs. 1,200/-. The learned Judges pointed out that it was a device to divide the estate between the reversioners and the widow, and as such it was an arrangement which cannot be held to be a bona fide surrender to which effect can be given.³⁸

In Krishnamurthy *vs.* Seshayya too a similar view was taken. In that case a transaction was brought about under the colour of a surrender by which the widow purported to surrender her entire estate in favour of her nearest reversioner and the said reversioner made alienations in favour of persons who are found to be *benamdars* for her brother's son. The learned judges held that the surrender was not bona fide, but was a device to divide the estate by which the next reversioner

gave part of the estate to another in order that the reversioner might get the remainder *in praesenti*, and therefore not valid.³⁹

There is a series of reported cases of the Madras High Court decided after Rangaswamy vs. Nachiappa, wherein the surrenders were held to be invalid when the parties intended by such devices to divide the estate between the reversionary heirs and the widow or her nominee.

Venkatasubba Rao, J. of the Madras High Court in Subbalakshmi vs. Narayana Ayaar, expressing his views with regard to a *bona fide* surrender and the motives of a widow observes : "First, a surrender to be valid, must be of the surrenderer's whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of alienation ; a surrender being an effacement of the widow and it being impossible to conceive of the widow, who is partly effaced and partly not so, a partial surrender, although absolute as to the part conveyed, cannot under the Hindu Law be effectual. Secondly, a surrender must be *bona fide*, i.e. there must be no device to divide the property between the lady and the reversioner, it being equally fatal to the transaction whether the benefit is directly taken by the lady or by her nominees, subject, however, to the proviso, that the giving of a small portion to the surrendering widow for her maintenance is unobjectionable.

The transaction must be *bona fide* in the sense that the widow retains no benefit either directly or indirectly, i.e. there must be a complete relinquishment. If in the guise of a surrender, the widow enlarges her own estate in regard to a part, the so-called surrender will not be upheld. I do not think there is any warrant for importing a third and further consideration, namely that the motives operating on the mind of the widow must be of a religious or spiritual character".⁴⁰

The question of surrender was also considered by the High Court of Bombay in 1901 in the case of Vinayak vs. Govind.⁴¹ In the course of his judgment Jenkins, C. J. says : "There can be no question that, apart from legal necessity, a widow can validly alienate land that has devolved upon her from her husband with the consent of the reversioner. The basis on which this rests is a matter of controversy ; the High Court of Calcutta on the whole appears to favour the view

that the consent derives its effect from the power supposed to reside in a widow of accelerating, by the surrender of her own interest, the interests of the reversioners. It is impossible not to feel some difficulty as to this doctrine.....The other view is that the consent of the persons interested to oppose the transaction evidences its propriety, if not its actual necessity. This has a parallel in the law relating to a widow's adoption⁴² under certain circumstances and it finds support in the texts... This view has, too, in a large measure the sanction of the Privy Council." And he quotes the cases in 8 Moo. I.A. and 13 Moo. I.A. which have been already referred to. Turning then to Bombay he goes on to say : "The High Court here appears to have accepted this view rather than that which finds favour in Calcutta." In this case Ranade, J. also points out that "the Bengal theory that the widow's interest is a life interest, and that her surrender or release of that interest to the next reversioner accelerates his obtaining the full title, has never met with much acceptance on this side of India. Our leading case *Varjinar Rangji vs. Ghalji Gokaldas*⁴³ lays down that the consent must be of all the kindred, but this does not mean that every single member who is a kindred must actually join in the conveyance".⁴⁴ And the conclusion to which he comes is that, in order to validate an alienation by a widow otherwise than for legal necessity, "the consent of the reversioners must be of such kindred the absence of whose opposition raises a presumption that the alienation was a fair and proper one".⁴⁵

It may be noticed that the distinction between the two views is not merely academic. Whereas, under the Calcutta view an alienation effected by a Hindu widow with the consent of the next reversioners would be treated as valid and the validity of such a transfer would ordinarily not be open to challenge by the actual reversioner, on the Bombay view such consent merely raises a presumption which can be rebutted and the actual reversioner can, in conceivable cases, successfully prove that the transaction was not proper and justified.

In *Manjaya vs. Shesgiri*, making their observations with regard to the doctrine of surrender, the learned judges of the Bombay High Court laid down that an alienation by a widow or other limited heir of the estate inherited by her may be supported if it can be shown to be a surrender of her entire

interest in the whole property in favour of the whole body of the persons constituting the next reversion.⁴⁶

Therefore the principles underlying surrender by a Hindu widow are, (a) that there must be a complete self-effacement of the surrendering widow with the intention of accelerating the succession of the next apparent heir; (b) that the surrender must be *bona fide* and must not be a mere cloak, the real object being to divide the estate between the reversionary heir and the widow; (c) that it is the substance of the transaction that has to be considered in determining the question whether a conveyance operates as a good surrender or not. If however, provision for the maintenance of a widow is made by reserving a small portion of the property for that purpose, that provision will not affect the validity of surrender as a whole.⁴⁷

But where the surrender by a Hindu widow in favour of a reversionary heir is a *bona fide* transaction, its validity will not be effected if through an honest omission or ignorance or oversight the widow reserves a small portion of the estate for herself; such omission should not be considered as affecting the validity of the surrender which apart from it was a *bona fide* transaction.⁴⁸

In other words, the omission, due to ignorance or to oversight, of a small portion of the whole property, does not make the surrender invalid when it is otherwise *bona fide* and proper.

In *Mohalu Shidappa Dhembare vs. Shandar Dadu*, a Hindu widow executed a deed of gift in favour of a third person of all properties left by her husband and three months thereafter her daughter, the next reversioner, executing a deed of consent in favour of the third person on receiving consideration from him, Gajendragadhar, J. of the Bombay High Court observes: "In the present case the first transaction of gift is by the widow and the next reversioner is not a party to it, while the second is by the next reversioner and the widow is not a party to it. There is thus no basis, even fictitiously, for the alleged surrender by widow to daughter, with the result that at the date of the second transaction daughter's rights were no better than *spes successionis*".⁴⁹

From the above-mentioned observations one may notice that the learned judge took a view which is contrary to the one taken in *Nobokishore's case*. Further it may be added

that the distinction between surrender and consequent devolution of property and alienations, is real and substantial and this distinction must be borne in mind when the validity of the widow's transactions is being considered. If it is a transfer properly so called, consent of reversioners is relevant and may raise a presumption about the propriety or the validity of the transfer. If the transfer results from surrender, it must follow the surrender and it cannot be validated by subsequent consent, because in such a case there is no surrender at all.

Proceeding to the decisions given by the Supreme Court, we find a more exhaustive discussion of the subject. In *Mumma Reddy vs. Durairaja Naidu*⁵⁰, the properties belonged to one N. who died leaving him surviving his wife W. and a daughter D. D. was married to one R. Before the death of W. she executed a release deed in favour of her daughter D. and her son-in-law R. under which the entire estate of N. was given to them. After the death of D. the next reversioners filed the suit for recovery of the properties subsequently alienated by D. and R.

The question to be determined was whether the release deed operated as a valid surrender. The Supreme Court laid down that the document did not operate as a valid surrender. B. K. Mukherjee, J. said: "The effacement may be effected by any process and it is not necessary that any particular form should be employed . . . It would be clear from the principle underlying the doctrine of surrender that no surrender and consequent acceleration of estate can possibly be made in favour of anybody except the next heir of the husband. It is true that no acceptance or act of consent on the part of the reversioner is necessary in order that the estate might vest in him; vesting takes place under operation of law. But it is not possible for the widow to say that she is withdrawing herself from her husband's estate in order that it might vest in somebody other than the next heir of the husband.

In favour of a stranger, there can be an act of transfer but not one of renunciation. The position is not materially altered if, as has happened in the present case, the surrender is made in favour of the next heir with whom a stranger is associated and the widow purports to relinquish the estate in order that it might vest in both of them.

So far as the next heir is concerned, there cannot be in such a case a surrender of the totality of interest which the widow has, for she actually directs that a portion of it should be held or enjoyed by somebody else other than the husband's heir. As regards the stranger there can be no question of renunciation; the transaction at the most may be evidence of an intention to confer a bounty on him, though such intention is not clothed in proper legal form".⁵¹

It is evident from the above-mentioned proposition that a surrender can validly be made of the whole property in favour of the next reversionary heirs. An abandonment of estate by a widow in favour of a reversioner and a stranger is not valid in the legal sense, for the entire property is not relinquished in favour of the next reversionary heir.

Besides, this decision supports the proposition that an alienation in favour of a reversionary heir of the whole property and an alienation by the reversioner thereafter of a part of the property in favour of a stranger, is held good. Discussing this point the learned judge pointed out: "It would be quite consistent with established principles of law if the widow relinquishes her interests in the husband's estate and the reversioner in whom the estate vests, transfers the estate either in whole or in part to another person. If the transfer is of the either estate, the two transactions may be combined in one document and the widow and the reversioner might jointly transfer the whole estate to a stranger, but the implication in such cases must always be that the alienee derives his title from the reversioner and not the widow." His Lordships continued: "The extension of this doctrine in the class of cases of which *Nobokishore's case*⁵² may be taken as the type, seems to be rather far-fetched and somewhat anomalous. In these cases, the effect of the immediate reversioner's giving consent to the alienation of the whole estate by the widow to a stranger has been held to import a double fiction; the first is the fiction of a surrender by the widow in favour of the consenting reversioner and the second is the fiction of a transfer by the latter to the alienee, although both fictions are contrary to the actual fact".⁵³

It may be noticed that the document executed by the widow did not purport, either in form or in substance, to be an

abandonment of her entire estate in favour of the daughter alone. Besides there is no indication that the interest intended to be given to the son-in-law, was being received by him by way of transfer from the daughter. Even if the transfer is of the whole estate, the two documents mentioned in the afore-said case cannot be combined in one, and the proper form is for the widow to surrender to daughter and for daughter then to convey to herself and her husband jointly.

It may be further added that the learned judge doubted the view expressed in Nobokishore's case. Leaving the question open, his Lordship of the Supreme Court said: "It may be necessary for this Court at some time or other to reconsider the whole law on this subject."

It is now apparent that the Supreme Court had doubts of the correctness of the observations in Nobokishore's case. Besides this, it is submitted that the judgment in that case cannot be upheld on any logical principle.

In *Natwarlal vs. Dadubhai*⁵⁴, Mukherjee, J. again discussed the doctrine of surrender exhaustively. Repeating the law on this point his Lordship of the Supreme Court laid down, "The whole doctrine of surrender is based upon this analogy or legal fiction of the widow's death. The widow's estate is an interposed limitation or obstruction which prevents or impedes the course of succession in favour of the heirs of her husband. It is open to the widow by a voluntary act of her own to remove this obstruction and efface herself from the husband's estate altogether."

"If she does that, the consequence is the same as if she died a natural death and the next heirs of her husband then living, step in at once under the ordinary law of inheritance."

Then quoting a passage from Lord Dunedin's decision in *Rangaswami vs. Nachiappa*⁵⁵ with approval, his Lordship said, "It is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest in degree if more than one at the moment, that is to say, she can, so to speak, by voluntary act operate her own death".⁵⁶

PROVISION FOR MAINTENANCE

Now the question to be determined is whether if the consideration consisted of a reasonable provision for the main-

tenance of the qualified heir herself this would alter the nature of the transaction and vitiate the doctrine of surrender. This point was considered in *Kundee Lall vs. Kalee Pershad*, where the learned judges held that the surrender by a widow is to be upheld in spite of a provision for maintenance provided it is reasonable.⁵⁷

The question was discussed more fully by the Judicial Committee in *Bhagwat Koer vs. Dhamukhari Prasad Singh*.⁵⁸ There, upon the death of a Hindu in 1872, his nephew obtained a certificate under Act XXVII of 1860 as sole survivor of his joint family; the widow of the deceased opposed the application and alleged a partition in 1864. By agreements made in 1874 the widow accepted the decision, recognised the nephew's title, and was granted by him a maintenance allowance which she continued to receive until her death in 1904. The nephew died in 1894 and the estate passed under his will to the first appellant. In 1907 the respondent sued to recover the estate as heir to the holder who died in 1872 upon his widow's death and proved that a partition had taken place in 1864. In that connection the Privy Council observed: "The widow's agreement of 1874, in conjunction with her acceptance of maintenance till 1904, amounted to a complete relinquishment of the estate to the nephew, then the next reversioner, and that D's claim accordingly failed." Their Lordships proceeded further to state: "It is true that the documents were drawn up on the footing 'not of a surrender of an acknowledged right, but of an admission that the right did not exist, but in substance and disregarding the form, there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate.'"

The Judicial Committee took a similar view in *Sureshwar Misser vs. Mt. Maheshrani Misrain*.⁵⁹ There a Hindu died leaving a widow and 4 daughters. By his will he bequeathed his immovable property to the daughters. On his death the daughters took possession of the property under the will. The next reversioner sued the widow and daughters to set aside the will. The parties entered into a compromise by which the daughters gave up their rights under the will, the widow surrendered all rights of succession to the immoveable property, and the plaintiff, who by the surrenders became entitled as next rever-

sioner, transferred half of the property to the daughters and the plaintiff and the daughters each gave a small portion of the land to the widow for her life. In the course of judgment the Privy Council said : "Is it then a device to divide the property between the lady and the reversioner ? . . . It is here that the fact if the arrangement being a compromise becomes of importance. Once the *bona fides* is admitted we have the situation of a contest under which, if the decision were one way, the estate was carried to the daughters away from the family, and a litigation in the course of which the estate would probably be much diminished. The situation made it a perfectly good consideration for the lady in order to avoid these results to consent to give up her own rights by surrender. On the other hand, it was a good consideration for the reversioner to get rid of the will and in a question with the daughters, who would take all by the will, to agree to give them a half of the property. . . . The conveyance of small portions of land to the widowed mother was unobjectionable as it was only for maintenance. Their Lordships are, therefore, of the opinion that the arrangements of the compromise cannot be stigmatized as a device to divide the estate between the surrendering lady and the nearest reversioner and cannot now be taken exception to."

Though it may be accepted as an established rule that a reasonable provision for maintenance of the qualified heir herself does not alter the validity of a surrender, it appears that the decisions in the Bombay State are not uniform.

In the case of *Adivappa vs. Tontappa* it was held contrary to the aforesaid rule by the learned judges of the Bombay High Court that where a provision for the maintenance of the widow for her life was attached as a condition to the gift, that did not constitute a valid acceleration, for any consideration was sufficient to change an acceleration into an alienation.⁶⁰ The decision in that case, it is submitted, was not sound. It may be said that the learned judges in *Adivappa's* case considered a provision for maintenance of the surrenderer from the point of view of how far a surrender for consideration is a valid surrender and took the view that consideration (even a provision for maintenance of the limited heir herself) suffices to change the nature of the transaction from an acceleration to

an alienation. The judges did not consider the validity of the surrender either from the point of view of a valid abandonment or a device.

Thus the decision in Adivappa's case is opposed to the rule laid down in Privy Council decisions.⁶¹ It is no longer good law in view of the rulings of the Judicial Committee in later cases as well as to the subsequent Madras and Bombay decisions.⁶²

The other case in the Bombay High Court which might throw doubt on the above-said rule is Gangadhar *vs.* Prabhudha.⁶³ There L., a Hindu widow, executed a deed of gift in favour of her daughter K. who was the next reversioner, by which she gave her the estate, about say 232 acres inherited by her from her husband. Out of the estate so-gifted, the widow reserved, say about 43 acres for the maintenance of herself and her daughter-in-law. Sir John Beaumont, C. J. observed, "It seems to me that the general principle established in Gaunden's case⁶⁴ is that the surrender by a widow to the next reversioner must be of her whole interest in the whole estate and must not be a device for dividing the estate with the reversioner and that Misser's case⁶⁵ imposes on that general principle a qualification that a surrender by a widow of her estate as part of a *bona fide* compromise is not rendered objectionable merely by a stipulation that the widow is to retain a small part of the estate for her maintenance.... Both Bhagwat Koer's case⁶⁶ and Misser's case⁶⁷ were in fact cases of compromise and as in my view they engrafted an exception upon the general principle, I think that we ought not to apply these cases to a case in which the facts are not similar.... The stipulation for maintenance out of a particular part of the property seems to me to infringe the general principle that the surrender must be a surrender of the total interest of the widow in the whole estate".⁶⁸ Broomfield J. said: "It is clear, I think, that the sanction accorded by the Courts to provisions for the maintenance of the widow must be regarded as somewhat anomalous. It is not easy to reconcile such a provision strictly with the requirement that there should be a complete effacement of the widow. It must be considered as an exception to the rule and in my view should not be extended. A provision such as we have here for the maintenance

of a person other than the widow is certainly inconsistent with the doctrine that the surrender must be total. I think an arrangement of this kind undoubtedly savours of a device to divide the estate".⁶⁶

It is submitted that the view taken by the learned judge is unsound, for two of the essential conditions of a valid surrender under the Hindu law are, first, a surrender must be of the entire estate and secondly, that there must be a transfer of title *in praesenti*. The effect of a valid surrender is always to accelerate the succession and vest the whole property in the reversioners at once. Thus a provision for maintenance in favour of a Hindu widow is sufficient to alter the character of the surrender.

The Madras High Court in *Chinnaswami Pillai vs. Appaswami Pillai*⁶⁷ where the widow and the only daughter surrendered their interests in the estate of the deceased in favour of the daughter's son under a deed executed by them both, stipulating therein that he should maintain them during their lifetime, and on the death of them all, the subsequent reversioner of the deceased sued to recover the estate from the father of the deceased daughter's son, laid down that the surrender was valid under the Hindu law and operated to vest the estate in the daughter's son and that the reversioners had no title to the property. Sadasiva Aiyar, J. observed: "A stipulation for her own maintenance by the widow will not affect the legal result of the surrenders. A Hindu female who surrenders an estate does not become civilly dead from the date of surrender for any purpose, except for making the person in whose favour the surrender is made heir to her husband's estate".⁶⁸

Considering this question in the Full Bench case of *Angamuthu Chetti vs. Varatharajulu Chetti*, Seshagiri Aiyar, J. pointed out, "To make a surrender effectual, it must comply with the following requirements: (a) it must be in favour of the nearest reversioner; (b) there must be no reservation; (c) it should be made *bona fide* and not as a device to effect the bargain between the widow and the reversioner. A provision for maintenance does not in the least affect the character of the surrender or derogate from its completeness. If a transaction is *ex facie* and in intention a surrender and reserves no portion of the property surrendered to the widow, the fact that

the surrenderee agrees to provide for the maintenance of the surrender would not vitiate the transaction".⁷²

Later in *Sitanna vs. Kiranna* where a widow reserved portion of the property for her maintenance, the Judicial Committee laid down that a conveyance by a Hindu widow to her daughter reserving only a portion of the estate for her maintenance, is a surrender of her estate and an acceleration of her daughter's succession. The basis of the doctrine of surrender in Hindu law is the effacement of the widow's interest and not the *ex facie* transfer by which such effacement is brought about, and the result of the surrender is merely that the next heir of the husband steps into the succession in the widow's place.⁷³

Having gathered information from the decided cases of the Privy Council and High Courts, one may conclude that a reasonable provision for the maintenance of a widow herself would certainly not alter the nature of the transaction nor vitiate the surrender. But, with great respect, it is said, that the view taken by the aforesaid Courts is unsound for reasons indicated above.⁷⁴

The recent decision of a Division Bench of the Madras High Court consisting of Mack and Krishnaswamy Naydu JJ. in *Venkatesuarlu vs. Challaia*⁷⁵ seems to engraft on the doctrine of surrender another theory. The facts of the case were: the last male holder P. died 60 years prior the suit, leaving the 20th defendant, a childless widow. Defendants 1 and 2 were the sister's sons of P. The widow surrendered her husband's estate in favour of defendants 1 and 2, the nearest reversioners. To effectuate the transaction, the widow and P's sister, the mother of the defendants 1 and 2, jointly executed the surrender deed in favour of defendants 1 and 2, conveying all the properties of P. subject to the condition that the reversioners should pay the widow a sum of Rs. 2,000 towards her maintenance and for religious purposes. Immediately after the execution of the surrender deed, the next reversioners and the remote reversioners divided the properties. On the same day, defendants 1 and 2 also executed a sale deed conveying about 4 acres of land to the widow's brother X for a sum of Rs. 3,000 out of which Rs. 2,000 was mentioned as having been received by defendants 1 and 2 to enable them to pay the

widow the maintenance as provided under the surrender deed.

More than 3 years thereafter X sold the said land to defendant 15, the widow's brother's son, for the same consideration. The learned judges held, on the evidence, that the transfer in favour of X was for adequate consideration. On the aforesaid facts and on the findings of the learned judges, the transaction might be supported on the basis of surrender, on the ground that the alienation by the next reversioners in favour of X was supported by consideration and, therefore, it was not a device to divide the estate between the widow and the reversioners.

But the learned judges stepped further and laid down the propositions which would appear to purport to vary the law of surrender as settled prior to the decision. Krishnaswamy Nayudu, J. laid down the question to be determined as follows: Could an arrangement entered into between the nearest reversioners and the other reversioners and even a relation of the widow whereby the properties are divided among them to which the widow might be a consenting party invalidate the surrender where the widow herself does not retain any interest?"⁷⁶

The learned judge further observed, "The fact that not only she desires to be free from the trouble of administering the estate but also desires to provide for a relation for whom she might have some affection, and where the reversioner who will be entitled to the estate accedes to her request in deference to her wishes and to make such a provision, cannot characterise the surrender as not a *bona fide* one".⁷⁷

The learned judge distinguished the earlier decisions of the Madras High Court on the basis that the finding in those decisions was that the transactions which they were considering were *benami* transactions in the sense that the transfer by the reversioners in favour of a nearer relation of the widow was really for her benefit and the effect of it was a retention of a portion of the property by the widow by adopting the transfer in favour of the relative as a device to divide the estate.

Support for his conclusion he derived from the Commentary of Jimutavahana on the text of Narada and also from the Commentary of Sri Krishna Tarkalankara on the *Dayabhaga*. The learned judge observed, "On these (*sapindas*, daughter's

sons, sister's sons, maternal uncles of her husband) and on the others should she bestow presents and not on the members of the family of her own father while these persons are living, for then the specification of paternal uncles and the rest would be superfluous. With their consent, however, she may make gifts to the kindred of her own father and mother, as declared by Narada In the disposal of property that is by gift etc. the wife is liable to the control of the family of her husband after the death of her husband and on failure of sons, so it is declared in the *Dayabhaga* Emphasis is laid in the texts on the paternal position occupied by the nearest reversioners, who are considered to be the guardians of the widow and are expected to protect her interests and guide and direct her in dealing with the properties of her husband".⁷⁸

From the above cited observations the learned judges decided that the widow can make gifts to her kindred with the consent of the reversioners. There seems to be no decided case in the country except in that part where, the *Dayabhaga* law is prevalent, which justifies gifts of immoveable estate by a widow in favour of her kindred relying on the above-mentioned texts. Besides this, she is also allowed as a limited owner to make gifts to reasonable extents of properties in connection with the marriage of her daughter. She is also entitled to make similar presents for the spiritual welfare of her husband or in connection with the obsequies of her deceased husband. But there seems to be no decided case where a widow enjoys a general power to make gifts of portions of her husband's property with the concurrence of the reversionary heirs. Even in the cases of alienations for legal necessity or for purposes binding on the estate, the reversioners' concurrence *proprio vigore* does not make the transaction valid but merely raises a presumption that the alienation was of the purpose binding on the property. According to the dicta of Lord Dunedin, concurrence does not give force *per se* but is only of evidentiary value.

Maine discussing this point in his book says : "But where the alienation is without consideration and is therefore in form or in substance a gift, the reversioner's consent cannot possibly be held to be one in respect of an alienation for value for purposes of necessity and the transaction therefore cannot stand

inspite of the consent".⁷⁹

But it is well settled that a reversioner has only a *spes successionis* and has no right *in praesenti* to convey any interest to third parties. His concurrence, therefore, cannot validate a gift, if it is not within the power of the widow to make such a gift. If such a power is admitted in the widow, it would be destructive of the theory of self-effacement involved in the mode of surrender; she could gift some properties to strangers and the rest to the reversionary heirs; or she could gift properties to her relatives with the consent of the presumptive reversioner and thus act to the prejudice of the actual reversion.

Therefore it seems unsound to hold that a widow has unlimited power to gift immoveable properties forming part of her husband's estate in favour of her relations with the concurrences of the immediate reversioner; for the rights of remote reversioner will be defeated who have *spes successionis* in the estate.

Coming to the conclusion, it is said that the views of the learned judge were that, unless, at the time of the transaction the property of the last male holder was divided between the reversionary heirs and the widow, it would not be a device to divide the estate. If there is complete effacement of her interests in the estate according to the learned judge, the fact that it was done pursuant to an arrangement to divide it between the reversionary heir and a nominee of the widow, would not affect the validity of the surrender, if the nominee was not a *benamdar* of the widow.

Accepting the reasoning of Krishnaswamy Nayudu, J. in that case, Mack, J. made the following observations: "The one condition necessary for a surrender by a childless widow to be valid is, as my learned brother has pointed out, that it should be *bona fide*. It must not be a division of the estate between the widow and the reversioner in order that each should have premature and absolute powers of alienation over a portion." He continued: "To cite an extreme case, if a young widow and an elderly reversioner without children should agree between themselves to divide the estate, and this arrangement was embodied in the form of a surrender deed with reservation for maintenance, it would clearly be a *mala fide* transaction with the object of defeating the other reversioners".⁸⁰

It is submitted that on principle as well as on authority the interpretation given of the word *bona fide* by Krishnaswamy Nayudu and Mack, JJ. is unsound. If it is recognised, it will make the widow and the reversionary heirs in collusion able to divide the property between the reversion and her nominee, a result tending to demolish the entire doctrine of surrender.

In a very recent case of *Rami Reddi vs. Rosamma*⁸¹ in the Andhra High Court again a question arose whether a relinquishment made by a widow of the entire estate in favour of the next reversioner pursuant to an arrangement, that the reversioner should give a part of it to the nominee of the widow, was valid in law. The Full Bench reviewed the whole law on this point and Suba Rao, CJ. presented the judgment: "I, therefore, answer the question formulated in the negative. Such a relinquishment is not valid in law." His Lordship continued, "...if the surrender is effected pursuant to a scheme of partition between the reversioners and the nominee of the widow, it would be bad for two reasons. It was a device to divide the estate between the widow's nominee and the reversioner. It would also be invalid, because in substance the entire property was not given to the reversioner but a part of it to the reversioner and the other part to her nominee... This result would be inconsistent with her self-effacement, for on her self-effacement, the reversioners should get the entire property. In either case, it would not be a *bona fide* surrender of the entire estate to the nearest reversioners. If the surrender is *bona fide*, i.e. if it is in effect and substance a complete self-effacement of the widow in the sense that succession to the entire property opens to the reversioners, the motives operating on the mind of the widow would be irrelevant".⁸²

ALIENATION PRIOR TO SURRENDER

Maine says, "There is a difference of opinion on this question. On the one hand the Madras High Court has held that if the prior alienation is for purposes binding on the reversioner, the subsequent surrender is valid.⁸³ On the other hand, it has been held in a series of cases that where a widow alienates part of the estate without justifying necessity and afterwards surrenders the whole of what remains to the next reversioner, the latter is not entitled to challenge the alienation made by

the widow until she dies.⁸⁴ In other words, the alienation is valid for her life and the alienee's possession cannot be disturbed during her lifetime. But the logical result of the theory of relinquishment is her self-effacement and letting in the next heir at once.⁸⁵ Expressing his views on this question in the case of *Debi Prasad vs. Golap Bhagat*, A. Mookherjee, J. pointed out, "In other words, the reversioners take the estate not merely when the widow dies, but also when her title is extinguished, for instance, by renunciation, remarriage, or the like".⁸⁶ Again in the case of *Prafulla vs. Bhaboni* the learned judges of the Calcutta High Court laid down that the reversioner was entitled to challenge the alienation immediately after the widow surrendered her estate.⁸⁷ This view was again followed in *Ram Krishna vs. Kaushlua*⁸⁸ by the same High Court and is now considered an accepted view of the said High Court.

Approving the decisions of the Calcutta High Court, a recent Full Bench case of *Natvarlal Punjabai vs. Dadubhai Manubhai* in the Bombay High Court has held that the reversioner is not bound to wait till the death of the widow but becomes entitled to obtain possession immediately on the surrender being executed.⁸⁹ Giving the decision Chagla, C.J. said, "Under the Hindu law, the basic principle of surrender is the destruction by the widow by her voluntary act of her life interest in her husband's estate. The act of transfer or the act of conveyance is a subsidiary thing to which the same importance cannot be attached as the destruction of the life-estate. Or, in other words, the widow constitutes an impediment or obstruction between the last full owner and the next full owner⁹⁰ and she by a voluntary act of hers removes that impediment by surrendering the whole of the estate which has come to her from her husband. The mere fact that antecedent to the deed of surrender the widow has alienated the property, does not preclude her from surrendering her life estate to the next reversioners, nor does it prevent the reversioners from being entitled to succeed as the heirs of the last full owner".⁹¹ This Full Bench seems to have overruled an earlier decision of the Bombay High Court in *Sakhram Bala vs. Thama*,⁹² where a Hindu widow, having made a gift of the estate in favour of her daughter, the reversioner, a later surrender was held to be invalid on the ground that the widow having executed the deed

of gift in favour of her nephew had put it out of her power to surrender her whole interest in favour of the reversioner.

Again, the point was considered in the Supreme Court in *Natvar Lal Punjabhai vs. Dadubhai Manubhai*,⁸³ where B. K. Mukherjee, J. pointed out, "A surrender conveys nothing in law and merely causes extinction of the widow's rights in her husband's estate; there is no reason why it should be necessary that the estate must remain with the widow before she could exercise her power of surrender. The widow might have alienated the property to a stranger or someone might have been in adverse possession of the same for more than the statutory period. If the alienation is for legal necessity, it would certainly be binding upon the estate and it could not be impeached by any person under any circumstance. But if the alienation is not for legal necessity, or if a squatter has acquired title by adverse possession against the widow, neither the alienation nor the rights of adverse possessor could affect the reversioner's estate at all. These rights have their origin in acts or omissions of the widow which are not binding on the husband's estate. They are in reality dependent upon the widow's estate and if the widow's estate is extinguished by any means known to the law, *e.g.* by her adopting a son or marrying again, these rights must also cease to exist. The same consequences should follow when the widow withdraws herself from her husband's estate by any act of renunciation on her part. Whether any equitable principle can be invoked in favour of a third party who has acquired rights over the property by any act or omission of the widow, may be a matter for consideration. As the rights acquired by the adverse possession are available only against the widow and not against the husband's heir, husband's estate still remains undestroyed and the widow may withdraw herself from that estate leaving it open to the reversioners to take possession of it at once as heirs of the last male holder unless there is any other rule of law or equity which prevents them from doing so."

Having examined a series of cases from the different High Courts and the Supreme Court, one may say that where the surrender is valid and *bona fide*, the reversionary heir becomes entitled to succeed in the entire estate of the widow. The doctrine of surrender operates as if it were the widow's civil death.

Therefore it seems that where a widow makes an alienation and afterwards makes a surrender, the reversionary heirs are entitled to recover the property at once and are not bound to wait till her demise.

SURRENDER FOLLOWED BY ADOPTION

Further a question to be determined is whether if prior to his adoption a valid surrender has been made by his adoptive mother, the subsequently adopted son can divest the property which has already vested in the surrenderee.

In *Rama Nana vs. Dhondi*,⁹⁴ the Bombay High Court laid down that a valid surrender made by a Hindu widow of her husband's estate to her next reversioner cannot be divested by a subsequent adoption of a son to her husband. The effect of a surrender is to vest an absolute estate in the reversioner and the subsequently adopted son is not entitled to question it. One may cite for purposes of comparison the rule that an adopted son cannot upset a testamentary disposition by his adoptive *Mitakshara* father. Sir Norman Macleod observed in that case, "As soon as we get rid of the notion of constructive pregnancy in the case of a widow with power to adopt, the result of an adoption upon prior alienations by the widow can be determined without any difficulty".⁹⁵ Commenting on this Chagla, C. J. in *Bahubali Vasant vs. Gundappa*⁹⁶ pointed out, "Unfortunately, this notion of constructive pregnancy is the very notion which was subsequently accepted by the Privy Council and which revolutionised the whole law of adoption as understood by this High Court. Therefore, with respect, the very basis of the judgment of the learned Chief Justice is that an adoption cannot have retrospective effect, that it is wrong to assume that the adopted son was in existence at the death of the husband, and therefore the adoption cannot disturb titles which were created prior to the adoption...."

In *Rama Nana's* case Crump, J. observed, "... the effect of the surrender by the widow was that the then reversioner took an absolute estate and as the surrender was an act which is by Hindu law within the competence of the widow, it is not easy to see any ground on which the adopted son can challenge it."⁹⁷

It is submitted that what we have to determine is, what

is the title which the surrenderee acquires but not the competence of the widow to surrender the estate of her husband. Thus it is said that Rama Nana's case is unsound and does not lay down the correct rules as to the right of an adopted son when there is a prior surrender by his adoptive mother.

In the cases of *Yershwant vs. Antu*,⁹⁸ *Pandurang vs. Ishwar*,⁹⁹ *Krishna Mhatarba vs. Baban*,¹⁰⁰ the learned judges seem to have simply followed the view in Rama Nana's case without giving any reason for the principle expressed by them. The same view is again taken in *Shantaram Abasakeb Power vs. Keru Krishna*.¹⁰¹ Sen, J. observed in that case, "Though a surrender operates by accelerating the reversion, i.e. the succession, it would appear to operate not as a case of succession but an act of alienation".¹⁰²

It is submitted that this is not an act of alienation by the widow that results in title being conferred upon that next reversionary heir. The basic feature of a surrender is not alienation but relinquishment of the limited estate of the widow and the succession opens therefrom by operation of law. Keeping this in view it is concluded that the above-mentioned case was wrongly decided.

In *Vishnu Pandu vs. Mahadu Bahurao*¹⁰³ the learned judges of the Bombay High Court seem to have taken a view contrary to that taken in Rama Nana's case. It was held in that case that the effect of a surrender by a widow is to accelerate the vesting of the estate in the next heir who is entitled after the death of the widow and as such the surrender is not an alienation of the estate by the widow for a lawful purpose so as to give the next heir an indefeasible title to the property and that the adopted son is entitled to take all the property in the hands of the next heir subject to lawful alienations by the widow or the next heir. Shah, J. pointed out, "... it was not, strictly speaking, an alienation of the estate by Bayaja but a voluntary act of extinction of her own estate. Consequently the relinquishment would not have the effect of bringing the present case within the rule that where an heir to the estate of a sole surviving coparcener has alienated property for a lawful purpose, the alienee acquires an indefeasible title and is entitled to retain the property contrary to the claim of an adopted son by a widow of the joint family."¹⁰⁴

In the recent Full Bench case of *Bahubali Vasant vs. Gundappa*¹⁰⁵ in the Bombay High Court, one Balappa died in 1908 leaving a widow Shrimati and a daughter Ratna who died in 1911. On June 24, 1920, Shrimati executed a deed of surrender by which she surrendered the whole estate of her husband to Vasant, son of Ratna. Vasant died on July 1, 1936. Shrimati adopted defendant No. 2 on September 15, 1935, and the plaintiff filed this suit claiming the property which had been surrendered by the widow under the deed of surrender. The learned judges of the Bombay High Court held that under Hindu law if prior to his adoption a valid surrender is effected by his adoptive mother, the subsequently adopted son can divest the property which has already vested in the surrenderee.

M. C. Chagla, C. J. observed, "It is very important to note that the title of the next reversioners does not depend upon any act of transfer or conveyance by the widow. As soon as the widow effaces herself and destroys her life interest by operation of law, the next reversioners succeed to the husband's estate. Therefore, the title of the next reversioners depends not upon any conveyance or transfer by the widow, but it depends upon their inheriting to the estate of the husband. Therefore the title which is vested in the next reversioners is a title by inheritance and not by a conveyance or transfer executed by the widow. It is also pertinent to bear in mind the vital distinction between an alienation by a widow for legal necessity and a surrender by a widow. In the case of legal necessity the widow alienates the property of her husband and the title of the alienee depends upon the alienation by the widow supported by justifying necessity; whereas in the case of a surrender it is not the alienation which is the foundation of the title of the next reversioner but, as already pointed out, it is the fact that he is the heir of the husband and the fact that the succession has opened up by operation of law that constitutes the foundation of his title. If, therefore, the title of the next reversioner is based upon inheritance, the question is, what is the effect of a subsequent adoption by the widow?"

"Now, it is well settled that a subsequent adoption has a retrospective effect in the sense that in the eye of the law the widow must be deemed to be ancient and the adopted son must

be deemed to be in existence at the death of the husband. It is true that any lawful alienations made by the limited owner would be binding upon the adopted son. It is equally true that a last male holder would be entitled to deal with the property as his own without taking into consideration the possibility of a future adoption, and in such a case the adopted son would take the property subject to the alienations made by the last male holder. But it is equally well established that an adopted son would be able to displace any title which arises by reason of inheritance.¹⁰⁶

From the foregoing discussions one may conclude that if the surrenderee has no title, because he had no right to inherit, his transferees can have no title (or merely a voidable title), and his heirs or legatees can be in no better position. They are, in short, the similar case as the alienees or heirs or legatees from a transferee from a widow without justified purposes or otherwise contrary to the powers of a female holding subject to the limited estate.

In *Shrinivas Krishnarao vs. Narayan Devji*,¹⁰⁷ the Supreme Court distinguishing divesting of a collateral who had inherited from another collateral of the adoptive father from divesting of an alienee from a widow precisely on the ground that the alienee could satisfy himself whether the alienation would be binding upon an adopted son, Venkatarama Ayyar, J. observed, "...Thus, transferees from limited owners, whether they be widows or coparceners in a joint family, are amply protected. But no such safeguard exists in respect of property inherited from a collateral, because if the adopted son is entitled on the theory of relation back to divest that property, the position of the mesne holder would be that of an owner possessing a title defeasible on adoption, and the result of such adoption must be to extinguish that title and that of all persons claiming under him. The alienees from him would have no protection, as there would be no question of supporting the alienations on the ground of necessity or benefit. And if the adoption takes place long after the succession to the collateral had opened...and the property might have meanwhile changed hands several times, the title of the purchasers would be liable to be disturbed quite a long time after the alienations."

In that case the adopted son claimed to divest the surrenderee's successors, for his alleged succession was without title and the very problem which the Supreme Court envisaged in that case must arise since anyone who takes from a surrenderee must know that his or her title is defeasible upon the surrender being set aside. An aspect of this question was discussed in *Natwarlal Punjabhai vs. Dadubhai*,¹⁰⁸ where B. K. Mukherjee, J. said, "... where there is no necessity for alienation, the interest which she (widow) herself holds and which she can convey to others is not an indefeasible life estate, but an estate liable to be defeated on the happening of certain events which in Hindu law cause extinction of the widow's estate. Remarriage by the widow is one such event which completely divests her of any interest in her husband's property. Adoption of a son to her husband is another circumstance which puts an end to her estate as heir to her husband, the effect of adoption being to bring in a son who has prior claims to succession under the Hindu law. In both these sets of circumstances it is not disputed that prior rights derived from the widow, if not supported by legal necessity, could be defeated by the next heir of the husband or the adopted son as the case may be."

Further support for the preposition contended for presently obtained from *Subbareddi vs. Kovindareddi*,¹⁰⁹ where Uma-maheswaram, J. said, "A transferee of a widow's estate is certainly entitled to continue in possession during the lifetime of the widow unless other contingencies like remarriage, adoption etc. take place. The interest conveyed to the transferee is not only transmissible to his heirs at law but may also be sold, mortgaged, exchanged or gifted during the lifetime of the widow."

From the above mentioned discussions it is concluded that the subsequently adopted son can displace the title which arises by reason of inheritance and thus can divest the property which has already vested in the surrenderee.

In June 1956 the legislature expressed attention in unmistakable terms that a Hindu woman is an absolute owner of everything which she "possessed" at the time of the commencement of the Act, 1956, and shall be full owner of whatever she might acquire in whatever manner after the com-

mencement of the Act subject to sub-section (2) of section 14. It is perhaps needless to enlarge upon the obvious and further conclusions that though a Hindu female could formally relinquish her interest in the property inherited from her husband etc. prior to the Act of 1956, she cannot do the same now. In other words surrenders are not possible after the commencement of the Hindu Succession Act, 1956, for there remains no reversion into whose hands the succession may be surrendered.

NOTES

¹ Wharton's Law Lexicon 14th Edition, P. 969.

² Hindu Law by J. R. Gharpure, 4th Edition, 1931, p. 426.

³ 1918, 41 Mad. 15, 99, F.B.

⁴ 1913, 40 Cal. 701, F.B. See also Ram Krishna vs. Kausalya, 1935 40 C.W.N. 208.

⁵ Dayabhaga, Chap. XI, Sec. 1, Paras 56, 60 and 64.

⁶ Dayabhaga, Chap. XI, Sec. 1, text 56.

⁷ Dayabhaga, Chap. XI, Sec. 1, text 60.

⁸ Dayabhaga, Chap. XI, Sec. 1, text 64.

⁹ Dayabhaga, Chap. XI, Sec. 1, text 59.

¹⁰ A.I.R. 1954, S.C. 61, 65.

¹¹ A.I.R. 1955, Andhra 232, 238 F.B.

¹² "One who has the right to property for his own or another's life." Pocket Law Lexicon, 8th Edition, P. 358.

¹³ Natver Lal Punjabhai vs. Dadubhai Manubhai, A.I.R. 1954, S.C. 61.

¹⁴ 1864, 1, W.R. 98.

¹⁵ 1892, 19, I.A. 30.

¹⁶ Ibid

¹⁷ 1918, 46 I.A. 72.

¹⁸ 1891, 19 I.A. 30.

¹⁹ 1884, I.L.R. 10 Cal. 1102, F.B.

²⁰ Rangaswami vs. Nachappa, 1918, 46 I.A. 72, 80.

²¹ 1884, I.L.R. 10, Cal. 1102, F.B.

²² Ibid

²³ 1913, 40 Cal. 721, F.B.

²⁴ 1913, 40 Cal. 721, 781, F.B.

²⁵ Rami Reddi, vs. Rasamma, A.I.R. 1955, Andhra 232, 234, F.B.

²⁶ 1913, 40 Cal. 721, 779, F.B.

²⁷ 1918, 46, I.A. 72.

²⁸ 1918, 46, I.A. 72.

²⁹ 1918, 46 I.A. 72 ; or A.I.R. 1918, P.C. 196, 199.

³⁰ 1919, 46 I.A. 259 ; or A.I.R. 1919, P.C. 75, 78—79 ; Rangaswami vs. Nachiappa, 1919, 46 I.A. 72 ; Sureshwar vs. Maheshwari, 1920, 47 I.A. 233 ; Behari Lal vs. Madho Lal, 1892, 19 I.A. 30.

³¹ Ibid, H. 79.

³² 1920, 47 I.A. 233 237—238 ; or A.I.R. 1921, P.O. 107 ; Rangaswami vs. Nachiappa, 1919, 46 I.A. 72 ; Bhagwat Koer vs. Dhanukdhari Prasad Singh, 1919, 46 I.A. 259 ; Behari Lal vs. Madho Lal, 1892, 19 I.A. 30 ; Langappa vs. Kamti, 1908, 31 Mad. 366 ; Pilu vs. Bahaji, 1910, 34 Bom. 165 ; Sham Rathi vs. Jaichha, 1917, 39 All. 20 ; Dilton Koer vs. Harku Singh, 1917, 2 P.L.J. 578.

³³ 1920, 47 I.A. 233.

³⁴ 1898, I.L.R. 21, Mad. 128, F.B. ; Rangaswami vs. Nachiappa, 1919, 46, I.A. 72 ; Delhi Prasad vs. Golap Bhagat, 1913, 40 Cal. 721, F.B. ; Pilu vs. Bahaji, 1910, 34 Bom. 165 ; Behari Lal, vs. Madho Lal, 1891, 19 I.A. 30 ; Man Singh vs. Nowlakbati, 1926, 53 I.A. II.

³⁵ 1891, 19 I.A. 30.

³⁶ 1908, I.L.R. 31 Mad. 446.

³⁷ 1918, 46 I.A. 72.

³⁸ Kottayya vs. Veerayya, A.I.R. 1925, Mad. 177 ; Krishna vs. Subhanna, A.I.R. 1929, Mad. 611 ; Govind Prasad vs. Siringa, A.I.R. 1931, Bom. 107 ; Ram Ratan Pal vs. Gangotri, A.I.R. 1935, All. 53 ; Anant vs. Lila Rupnarayan, A.I.R. 1946, Nag. 9.

³⁹ Krishnamurthy vs. Seshayya, A.I.R. 1944, Mad. 439 ; Ramayya vs. Lakshmayya, A.I.R. 1938, Mad. 513.

⁴⁰ A.I.R. 1934, Mad. 535-536.

⁴¹ 1900, I.L.R. 25, Bom. 129.

⁴² The consent of kindred in the matter of adoption in those provinces, where such consent is required, stands on the same footing as mentioned in the above paragraph.

⁴³ 1881, I.L.R. 5 Bom. 563.

⁴⁴ 1900, 25 Bom. 129, 139.

⁴⁵ Ibid, 140.

⁴⁶ 1925, 49 Bom. 187 ; Marudamuthu vs. Sriniraya 1898, 21 Mad. 128, F.B. ; Rangaswami vs. Nachiappa 1919, 46 I.A. 72 ; Debi Prasad vs. Golap Bhagat 1913, 40 Cal. 721, F.B. ; Pilu vs. Babji 1910, 34 Bom. 165 ; Behari Lal vs. Madho Lal 1891, 19 I.A. 30 ; Man Singh vs. Nowlakhati 1926, 53 I.A. II ; Moti vs. Lal Das 1917, 41 Bom. 93 ; Khawani Singh vs. Chet Ram 1917, 39 All 1 ; Sham Rathi vs. Jaicha 1917, 39 All. 520 ; Anant vs. Lala Rupnarayan 1945, Nag. 698.

⁴⁷ Haribhai Nanaji vs. Narayan Hari A.I.R. 1938, Bom. 438 ; Mt. Bhagwat Koer vs. Dhanukdhari Prasad Singh, 1919, 46, I.A. 259 ; Sureshwar Misser vs. Mt. Maheshwari Misrani, 1920, 47 I.A. 233 ; Sitanna vs. Viranna, 1934, 61, I.A. 200.

⁴⁸ Haribhai Namaji vs. Narayan Hari, A.I.R. 1938, Bom. 438 ; Dharama Rao vs. Veeriah 1945, I.M.L.J. 423 ; Krishnavenamma vs. Hanumantha Rao, A.I.R. 1933, Mad. 860 ; Drageswaree vs. Mano Ramfian Datta, 1937, I.Cal. 690 ; Vadlamudi Gopalkrishnayya vs. Vadlamudi

Gangayya, 1917, 52, I.C. 749 ; Gopal Singh vs. Ujagar Sing, A.I.R. 1954, S. C. 579.

⁴⁹ A.I.R. 1953, Bom. 357.

⁵⁰ A.I.R. 1952, S. C. 109.

⁵¹ A.I.R. 1952, S. C. 109, 111.

⁵² I.L.R. 10 Cal. 1102, F.R.

⁵³ A.I.R. 1952, 109, 112.

⁵⁴ A.I.R. 1954, S. C. 61, 66 ; Followed in Ram Karan Singh vs. Baidka Singh, A.I.R. 1954, Pat. 545.

⁵⁵ 1918, 46 I.A. 72.

⁵⁶ A.I.R. 1954, S. C. 61 ; Following Rangaswami vs. Achiappa, 46 I.A. 72.

⁵⁷ 1874, 22 W.R.C.R. 307.

⁵⁸ 1919, 46, I.A. 259.

⁵⁹ 1920, 47, I.A. 233.

⁶⁰ 1920, 44, Bom. 255.

⁶¹ Bhagmat Koer vs. Danukdhari Prasad Singh, 1919, 46, I.A. 259 ; Sureshwhar vs. Moheerani, 1920, 47, I.A. 233.

⁶² Sitanna vs. Viranna, 1934, 61, I.A. 200 ; Man Singh vs. Nolk-bati, 1926, 53, I. A. 11 ; Chinnaawami vs. Appaswami, 1918, 42 Mad. 25 ; Angamuthu vs. Varathrajulu, 1918, 42 Mad. 854 ; Gangadhar vs. Probhudha, 1932, 56 Bom. 410 ; Govindprasad vs. Shivilunga, 1930, 32, Bom. L. R. 1482 ; Kundee Lal vs. Kalee Pershad, 1874, 22, W.R.C.R. 307 ; Anna vs. Gojra, 1928, 30 Bom. L. R. 867 ; Ram Nana vs. Dhondi, 1923, 47 Bom. 678, Ramayya vs. Sirgaraju Subha Rao, A.I.R. 1935, Mad. 664 ; Mathu Ramayya vs. Lakshmayya, A.I.R. 1938, Mad. 513 ; Anant Nilkanth vs. Rupnarayan, A.I.R. 1946, Nag. 9 ; S. Dayal vs. Mst. Kamalabati, 1950, I.L.R. Nag. 589.

⁶³ 1932, 56 Bom. 410.

⁶⁴ 1918, 46 I.A. 72.

⁶⁵ 1920, 47 I.A. 233.

⁶⁶ 1919, 46 I.A. 259.

⁶⁷ 1920, 47 I.A. 233.

⁶⁸ 1932, 56 Bom. 410.

⁶⁹ Ibid, 426.

⁷⁰ A.I.R. 1919, Mad. 865 ; Vadlamani Seshamma vs. Cadlamani Kondamma 1955, Andhra W.R. 553.

⁷¹ Ibid 866 ; Vadlamani Kondamma vs. Vadlamani Seshamma, 1956, Andhra W.R. 415.

⁷² A.I.R. 1920, Mad. 627, 631 ; F.B.

⁷³ 1934, 61, I.A. 200 ; Krishna Mahatarba Vs. Babau Rambhan, 1945, I.L.R. Bom. 24.

⁷⁴ 1932, 56, Bom. 410, 426.

⁷⁵ A.I.R. 1953, Mad. 551.

⁷⁶ A.I.R. 1953, Mad. 551, 553.

⁷⁷ Ibid, 554.

⁷⁸ A.I.R. 1953, Mad, 551, 555.

⁷⁷ Maine's Treatise on Hindu Law and Usage, 11th Ed. P. 782.

⁷⁸ A.I.R. 1953, Mad. 551.

⁷⁹ A.I.R. 1955, Andhra 232 F.B.

⁸⁰ A.I.R. 1955, Andhra 232, 239, F.B.

⁸¹ Ramyya vs. Bapanamma, I.L.R. 1937, Mad. 248.

⁸² Gopal Das vs. Sri Thakurji, A.I.R. 1936, All. 422.

⁸³ Maine's Treatise on Hindu Law, Hindu Law and Usage, 11th Ed. p. 790.

⁸⁴ 1913, 40, Cal. 721, 772, F.B.

⁸⁵ 1925, 52, Cal. 1018.

⁸⁶ 1935, 40, Cal. W.N. 208.

⁸⁷ A.I.R. 1950, Bom. 55, 60, 61, F.B.

⁸⁸ It may be noted that the reversioner may be a limited owner.

⁸⁹ Natvarlal Punjabhai vs. Dadhbhai Manubhai, A.I.R. 1950, Bom. 55, 58-59 F.B.

⁹⁰ 1928, 51, Bom. 1019.

⁹¹ A.I.R. 1954, S. C. 61.

⁹² 1923, 47 Bom. 678.

⁹³ Ibid, 689.

⁹⁴ 1954, 56 Bom. L.R. 501, 507, F.B.

⁹⁵ 1923, 47 Bom. L.R. 678, 691.

⁹⁶ 1934, 36 Bom. L.R. 671.

⁹⁷ 1938, 40 Bom. L.R. 1270.

⁹⁸ 1943, 46 Bom. L.R. 634.

⁹⁹ 1947, 50 Bom. L.R. 283.

¹⁰⁰ Ibid. p. 286.

¹⁰¹ 1950, 52 Bom. L.R. 599.

¹⁰² 1950, 52 Bom. L.R. 599, 602.

¹⁰³ 1954, 56 Bom. L.R. 501, F.B.

¹⁰⁴ 1954, 56 Bom. L.R. 501, 505, F.B.

¹⁰⁵ A.I.R. 1954, S.C. 379.

¹⁰⁶ A.I.R. 1954, S.C. 61.

¹⁰⁷ A.I.R. 1955, Andhra 49.

CHAPTER V

THE REVERSIONERS AND THE HINDU WOMAN'S LIMITED INTEREST

DECREE AGAINST A WIDOW AND ITS EFFECT ON THE RIGHTS OF REVERSIONARY HEIR

The same rules which determine the validity of private sales by a Hindu female, will also determine sales effected in execution of decrees against a limited female owner. Though a widow enjoys absolute rights over the estate of her husband for certain purposes, yet it would not be disposed of for the personal debts of the widow or in execution of a personal decree against her. All that could be attached and sold under it would be her own qualified interest in the property left by her husband.¹ Similarly where a decree for arrear of rent was given against a daughter in possession of the property inherited from her father, it has been observed that the debt was a personal debt for which the father's property could not be held liable. But where the heiress is sued in the capacity of a representative of the estate and a decree is obtained against her, then the estate is liable to be alienated in execution of the decree.² There will be no difficulty if the decree is passed during the lifetime of the male owner and the female is brought on the record as his legal representative. The sale of the entire estate will be justified, but if the decree has not been so given, then the suit will have to be filed again against her as representative of the last male owner. Where such a method is adopted and a decree is taken against the widow, then the sale in execution of the decree will pass not the widow's personal interest in the estate but the entire estate. In *Ishanchander Mitter vs. Buksh Ali* discussing this point, Sir Bernes Peacock pointed out, "Supposing in an ordinary case a suit is brought against an executor, and judgment is given against him as an executor, the purchaser under an execution buys not the personal estate of the defendant but the property of the defendant in his representative character for a debt which was due from him in that capacity".³ The

principle laid down in the above cited case has been approved by the Privy Council in subsequent cases.⁴ Summarizing the effect of these rulings of the Privy Council in the case of *Roy Radhakissen vs. Nauratan Lal*⁵, Mookerjee, J. stated, "It is well settled that the test to be applied in order to determine the exact interest which passes at a sale in execution of a decree against a Hindu widow or a qualified proprietor similarly situated, is whether the suit in which the sale was directed was one brought against the widow upon a cause of action personal to herself or one which affects the whole inheritance of the property in the suit." Where a claim in the suit is merely personal against the widow, in that case only the widow's limited interest is sold and it does not make the reversionary interest liable. But where a suit is brought against the widow in connection with the estate or for a reason which is not a simply personal reason of action against the widow, then the entire estate is bound by it.

In course of this discussion a question arises how far a decree taken against a Hindu widow either in a suit filed by or against her is binding on the reversion of her husband. In *Katama Natchiar vs. Raja of Shivaganga*, the Privy Council observed that where there has been a decree in suit brought by a widow for possession of a *zemindary* as heir to her husband, it would have bound those claiming the *zemindary* in succession to her if there had been a fair trial of the right in that suit that is effectual and operative against the revisionary heir unless the decree can be successfully impeached on special grounds.⁶ Delivering the judgment in this case, Turner, L.J. said, "The whole estate would, for the time, be vested in her absolutely for some purposes though in some respects, for a qualified interest and until her death it could not be ascertained who would be entitled to succeed. The same principles which have prevailed in the Courts of this country, as to tenants in tail representing the inheritance would seem to apply to a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow".⁷ The principle was reaffirmed by the Judicial Committee in *Vaithialing vs. Shingath*.⁸ There the facts of the case are : a Hindu belonging

to the *Sudra* class died in 1849 leaving a widow A. In 1862 A adopted B, as a son to her husband and put him in possession of the properties inherited by her from her husband. At that date there was no person who could give B in adoption and the adoption was invalid. B died in 1864. On his death his nephew, claiming as his heir, entered into possession of the properties. The nephew died in 1881. On his death the nephew's mother M entered into possession of the properties and held them until 1884 when A forcibly ejected her. In 1887, M brought a suit against A for possession of the properties. In 1892 a decree was passed for possession in favour of M, the Court holding that though B's adoption was invalid, M's claim for adverse possession for 12 years was established. A died in 1902. In 1905, the plaintiffs claiming to be the reversionary heirs of the original deceased sued M for possession of the properties. The High Court dismissed the case. On appeal to the Privy Council it was laid down that the principle of the *Shivaganga* case⁹ applied and that the decree of 1892 against the widow A was binding upon the reversioners, the decree having been passed after a fair trial of the issue. The cases of other female heirs such as the daughter and the mother have also been held to be governed by the principle laid down in the aforesaid cases.¹⁰

WIDOW'S POSSESSION AS HEIRESS NOT ADVERSE TO REVERSIONER
BUT WHERE SHE HOLDS INDEPENDENTLY OF HER HUSBAND IT IS
OTHERWISE

Where a widow is in possession of her deceased husband's property as an heiress entitled to a limited estate, her possession is not adverse to the reversion. But if she holds the property independently and not deriving her title to it through her husband, her possession becomes adverse to the reversionary heirs and limitation in such a case is applied from the date of such possession. For instance, a widow whose husband was a member of a joint Hindu family at the time of his demise and who can, therefore, only claim maintenance, holds her deceased husband's property after his death. Under such circumstances if a suit by the coparceners of her deceased husband is filed after twelve years from the date of such possession, it will be barred by limitation because her pos-

session is regarded as adverse to the reversionary heir or the coparcener as the case may be. Therefore where the mother (not being the heir at law) holds the estate of her deceased son and remains in possession for more than twelve years, a suit by the reversioners of the son and the son's widow was held barred by limitation.¹¹ The reason is that the possession of the mother was not that of a Hindu widow as such but as a trespasser. But where the widow acquires the possession of the estate of her deceased husband as his heir, she could not by any act or pronouncement of her own, while she still continues to be in possession of that estate, give her possession or estate a title different from that attaching to the possession or estate of a Hindu widow.¹²

EXTINCTION OF WIDOW'S RIGHT DOES NOT EXTINGUISH THAT OF REVERSIONARY HEIR

The reversionary heir does not claim his right through the widow; therefore, the extinguishment of her right under section 28 of the limitation Act does not extinguish his. A reversionary heir derives his right through the last male owner and has no interest in the property save a *spes successionis* until the death of the limited heir and the possession, as mentioned above, will be adverse against him only from the death of his limited heir and not earlier. Therefore the reversioner is entitled to recover possession of the property, if it is immoveable, within twelve years from the date of the cessation of the widow's interest under Article 141 of the Indian Limitation Act (Act IX of 1908) and if it is moveable, within six years from that date under Article 120 of that Act.¹³ In the case of *Bejoy Gopal v. Krishya* it was held by the Privy Council that where a Hindu widow leased the immoveable property of her deceased husband for a period extending beyond her own life, the reversionary heir can file a suit to recover the same under Article 141 of the Indian Limitation Act, which lays down 12 years' period of limitation and not under section 91 of the second schedule which prescribes the three years' period.¹⁴

REMEDY FOR REVERSIONERS AGAINST WASTE OF THE PROPERTY BY A WIDOW

Where a Hindu widow commits waste of the corpus of

property inherited by her from her deceased husband, the reversionary heir or any other rightful heir of her husband is empowered to take necessary measures. He may bring a suit in the nature of the bills *quia timet* of the Chancery Courts in the United Kingdom. According to Story, J. these bills to check the widow from wasting the property are, "in the nature of writs of prevention, to accomplish the ends of precautionary justice. They are ordinarily applied to prevent wrongs or anticipated mischiefs, and not merely to redress them when done. The party seeks the aid of the Court of Equity, because he fears *quia timet* some probable injury to his rights or interests and not because an injury has already occurred which requires any compensation or other relief".¹⁵ Recognising the power of the Courts in India to grant relief in such suits in the case of *Hurry Dass v. Rungunmoney*, Sir Lawrence Peel, C.J. pointed out, "The Hindu female is rather in the position of an heir taking by descent until a contingency happens, than an heir or devisee upon a trust by implication. Therefore a bill filed by the presumptive heir in succession against the immediate heir who has succeeded by inheritance must show a case approaching to spoliation".¹⁶ Again, the Privy Council in *Hurry Dass Dutt v. Srimuthy Uppoornah* laid down that the bill *quia timet* by a reversionary heir against the daughter of an intestate Hindu in possession of property was rightly dismissed as it was not shown that there was danger to the property from the mode in which the party in possession was dealing with it.¹⁷ But a bill *quia timet* is not the only remedy. The Court may in a proper case grant relief by appointing a receiver. Sen, J. of the Allahabad High Court in *Jemna Prasad v. Mt. Durga Devi* said, "Though it is only in rare cases that Court would appoint a Receiver of the property that has come into the hands of a widow on account of reckless waste on her part, at the same time it is legal to appoint a Receiver under certain exceptional circumstances. If waste is established and the advisability for the appointment of Receiver proved, a transferee from the widow is liable to be ousted just as much as the widow for he does not obtain a higher right than the widow herself".¹⁸ Accordingly the reversioners have a similar remedy against the transferee of the widow or other limited heir in

order to check the waste or improper use of property. The appointment of a Receiver is, however, a remedy comparatively rarely employed.

In the case of acquisition of immoveable property in which a widow or a daughter has a life estate by Government under Act I of 1894, sufficient protection is made in order to check the waste of the compensation money. Under section 32 of the Act such money shall not be given to the widow but shall utilized to buy other immoveable property to be held under similar title and conditions of ownership as the immoveable property in connection with such funds shall have been deposited or held or if such purchase cannot be made forthwith, then in such Government or other approved securities as the Court shall consider right. The payment of the rent or other income from such investment shall be made to the woman holder as the person for the time being authorized to the possession of such immoveable property.¹⁹

Where a widow had sold the estate to a third person without any justified necessity before the acquisition and such third person had taken the compensation money, he was held bound to pay the money back, so that the Court might invest it in the mode laid down by section 32 of the Act to the advantage of the reversion.²⁰ If the funds are used to buy other immoveable property, the transferee would be entitled to retain possession of it as qualified owner during the life-time of the widow.

NOTES

¹ Baijun Doobey v. Brij Bhokun, 1875, 2, I.A. 275 ; Nagendra v. Kaminee, 1867, 11 M.I.A. 241 ; Tirupatiraju v. Venkayya, 1922, 45 Mad. 504, (F.B.); Bai Kanku v. Bai Jadav, 1919, 43 Bom. 869 ; Anand Rao v. Anna Purnabai, 1937, Nag. 1 ; Millikarjungowda-Mudragowda v. V. Ramachandrappa, 1940, Bom. 628.

² Hari Nath v. Mothurmohan, 1894, 21 Cal. 8 ; Lalit Mohan v. dayamoyi, 1927, 45 C.L.J. 404.

³ Marshall's Ben App. Cases 614.

⁴ The General Manager, Durbhanga v. Ramapat, 1872, 33, 14 M.I.A. 605 ; Jugal Kishore v. Jotendra Mohan, 1884, 11, I.A. 66 ; Abdul Aziz v. Appayasami, 1904, 31 I.A. 1 ; Sripat Singh v. Tagore, 1917, 44, I.A. 1.

⁵ 1907, 6, C.L.J. 490.

⁶ 1863, 9, M.L.A. 539 ; Nagender v. Kaminee, 1867, 11 M.I.A. 241 ;

Baigun v. Brij Bhookun, 1876, 2, I.A. 275 ; Pratap Narain v. Trilokai, 1884, 11, I.A. 197 ; Risal Singh v. Balwant Singh, 1918, 45, I.A. 168 ; Mt. Mnai Bibi v. Tirloki Nath, A.I.R. 1931, P.C. 114 ; Raj Narain v. Bejoy Singh A.I.R. 1931, Cal. 73 ; Tej Singh v. Hannua Prassad, A.I.R. 1940, All. 433 ; Anant Nilkant v. Rupnarayan, A.I.R. 1946, Nag. 9, Lalit Mohan v. Lachmi Raj Kuer, A.I.R. 1946, Oudh. 213 ; Kaliammal v. Sunderammal, A.I.R. 1949, Mad. 84 ; Mst. Urbasi Dharauni v. Chandra Dhorna, A.I.R. 1957, Orissa 201.

⁷ 1853, M.I.A. 539.

⁸ 1925, 52, I.A. 322 ; Risal Singh v. Balwant Singh, 1918, 45, I.A. 168 ; Partap Narain v. Triloki Nath Singh, 1884, 11, I.A. 197 ; Munni Bibi v. Triloki Nath, 1932, 58, I.A. 156 ; Kaliammal v. Sunderammal, A.I.R. 1949, Mad. 84.

⁹ 1863, 9 M.I.A. 539.

¹⁰ Katamal Natchiar v. Raja of Shivaganga, 1863, 9, M.I.A. 539, 604.

¹¹ Katama Natchiar v. Raja of Shivagunga, 1863, 9 M.I.A. 539 ; Harinath v. Mothura Mohan, 1894, 20, I.A. 183 ; Vaithialinga v. Srirangath, 1925, 52 I.A. 322 ; Srimati Rajlakshami v. Bholanath, 1938, 65, I.A. 365 ; Ramdutt v. E.D. Sasson, 1929, 56 I.A. 128 ; Lilabati v. Bishnu C.L.J. 621 ; Roy Radhakissen v. Nowruthum 6 C.L.J. 490 ; Madan v. Akbarayar, I.L.R. 28 All 241 ; Kedar v. Jatindar, 9 C.L.J. 236 ; Aura-bindu Nath v. Manorama, 1928, 55, Cal. 903.

¹² Lachan Kunwar v. Manorath Ran, 1895, 22 I.A. 25 ; Rikdheo v. Sukhdeo, 1927, 49, All 713 ; Mahabir v. Adhikari, I.I.R. 23, Cal. 942 ; Suraj Balli v. Tilakdhari, 1928, 7 Pat. 163 ; Kauleshwar v. Ram Kishori, A.I.R. 1939, All. 699 ; Joychand v. Shyamacharana, A.I.R. 1942, cal. 448 ; Raja Chetter Singh v. Divan Roshan Singh, I.L.R. 1946, Nag. 159.

¹³ Ranchordas v. Parvatibai, 1899, 26 I.A. 71 ; Jaggo Bai v. Usavi Bai 1929, 56 I.A. 267 ; Bankey Lal v. Raghunath, 1929, 51 All. 189 ; Shambu Prashad v. Mahadeo Prasad, 1933, 55 All. 554 ; Shankar v. Bai Shiv, 1930, 54, Bom. 837 ; Bai Manchha v. Tribhovan, A.I.R. 1932, Bom. 434 ; Abinashchandra Ghose v. Narahari, 1930, 57, Cal. 289.

¹⁴ 1907, 34 I.A. 87.

¹⁵ Story's Equity Jurisprudence, Chap. XX, Sec. 826, 2nd Edition.

¹⁶ Hurry Doss v. Rungunmoney, Cases on appeal to High Court of Bengal in continuation of Marshall, by Sevestre, 1869, P. 661 ; Nobin Chunder v. Ishu Chunder, 9 W.R. 509 ; Mithulal v. Purshotam, A.I.R. 1940, Cal. 385 ; Arunchalam v. Krishaveni, A.I.R. 1941, Mad. 724.

¹⁷ 1856, 6 M.I.A. 433 ; Kathama Natchiar v. Doraisinga, 1875, 2 I.A. 169 ; Janki Ammal v. Narayansami, 1916, 43 I.A. 207 ; Arunchalam v. Krishnaveni, A.I.R. 1941, Mad. 724 ; Suraj Narain v. Ram Devi, A.I.R. 1939, Oudh. 78.

¹⁸ A.I.R. 1933, All. 138, 145 ; Maharani v. Nanda Lal, 10 W.R. 73 ; Shama Soonduree v. Jumona, 24 W.R. 86.

¹⁹ Sheorattan v. Mohri, I.L.R. 21, All. 354 ; Sheoprasad v. Jaliha, I.L.R. 24 All 189.

²⁰ Govind v. Shamlall, W.R. Sp. No. 165 ; Mrinalini v. Abinash, 1910, 11 C.L.J. 533 ; Kamini v. Promotho, 13 C.L.J. 597.

CHAPTER VI

THE HINDU SUCCESSION ACT, 1956, AND THE WOMAN'S LIMITED ESTATE

The general opinion of progressive and enlightened Hindus is to improve the position and conditions of living of females in India. Keeping it in view an Act named the Hindu Succession Act was passed by Parliament and received the President's assent on 17th June, 1956, by which a large number of women have in some cases for the first time been recognised as heirs and the limited estate of females has been put an end to. To make them economically independent and to insure a status of dignity and self-respect they have been made absolute owners of whatever property they 'possessed' at the commencement of the Act.

Section 14 of the Act which is mainly responsible for bringing about such a revolutionary change in the status of a woman runs as follows :—

"Section 14 (1). Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation : In this sub-section, 'property' includes both moveable and immoveable property acquired by a female Hindu by inheritance or device, or at partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatever, and also any such property held by her as *Stridhana* immediately before the commencement of the Act.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property."

In this section the most important provision is declaratory¹ and the explanation defines property. The draftsman confused the scope of the main sub-section and the explanation attached therein in the original bill. The original bill had declared that all acquisitions made by a Hindu female after the commencement of the Act were to become her absolute property, notwithstanding the manner in which they were made. The joint committee expressed their opinion that all property of a female Hindu possessed by her at the time of the commencement of the Act, though acquired prior to its commencement, shall also be recognised as her absolute property. In order to give this view a practical shape, the basic principles of Hindu law regulating succession in favour of females were abandoned. The female Hindu had become absolute owner in the great majority of cases immediately irrespective of legal limitations put on her estate at the moment of her acquisition of the estate.

JUDICIAL OPINION

Proceeding to judicial construction of the section we find that in *Venkayamma v. Veerayya*² where the appeals arose out of the suits instituted by the plaintiff G. Veerayya, the paternal uncle of Sambayya, deceased, for a declaration that certain sales of Sambayya's lands effected by his widow and mother were not binding on the reversioners, Viswanatha Sastri, J. of the Andhra High Court pointed out, "Though section 14 of the Act is retrospective in so far as it enlarges a Hindu woman's limited estate into an absolute estate even in respect of property inherited or held by her as a limited owner before the Act came into force, its operation is confined to property in the possession of the female when the Act came into force. The possession may not be actual physical possession or personal occupation but may be possession in law. The possession of a licensee, lessee or mortgagee from the female owner or the possession of a guardian or trustee or agent of the female owner would be her possession for the purpose of section 14. The 'possessed' is used in section 14 in a broad sense and in the context 'possession' means 'the state of owning or having in one's hands or power'. It includes possession by receipt of rents and profits."

"Where, however, before the Act came into force the female owner had sold away the property in which she had only a limited interest and put the vendee in possession, she should in no sense be regarded as 'possessed' of the property when the Act came into force. The object of the Act was to confer a benefit on Hindu females by enlarging their limited interest if they were in possession of the property when the Act came into force. The Act was not intended to benefit an alien who, with his eyes open, purchased property from the female limited owner without any justifying necessity before the Act came into force and at a time when the female vendor had only the limited interest of a Hindu woman."

In the case of *Hari Kishen v. Hira*³ giving his views on the scope and object of section 14 (1) of the Hindu Succession Act, 1956, Kapur, J. of the Punjab High Court observed, "Section 14 contemplates that if at the time the Act came into force a female Hindu was possessed of any property, then she shall hold it in future as full owner. This provision of law will not restore to her any property or any right in the property which she had parted with before the Act came into force."

From the aforesaid observations it may be gathered that a Hindu female becomes an absolute owner of the property possessed by her either in fact or in law at the time of the commencement of the Act and the property which she acquires after the commencement of this Act. But she is not an owner of the estate which she has sold.

Again, the High Court of Calcutta interpreted the sections 4 and 14(1) in *Gosta Behar Bera vs. Haridas Samanta*.⁴ There the properties in question belonged to two brothers Ramchand and Balaichand in equal shares. Ramchand died leaving behind a widow Haripriya and three daughters and Haripriya inherited a widow's estate in his properties. She died in 1352, B.S. and was survived by two of the daughters and by a son of a predeceased daughter. Haripriya had during her lifetime sold her share of the properties and executed two deeds of gifts. The plaintiff challenged the transfers made by Haripriya by way of sale and gift as without legal necessity and as such not binding on the sole reversionary heir. P. K. Sarkar, J. said, "The effect of sections 4(1) and 14(1) read together is

that the Hindu law regarding the Hindu widow's estate will not apply to property held and possessed by a Hindu female from the date of commencement of the Act and such Hindu female shall hold the property thereafter not as a limited owner under the Hindu law but as full owner. These provisions affect property held and possessed by a Hindu female at the date of the commencement of the Act and cannot affect any property which was held and possessed in the past by such female but had been transferred thereby ceased to hold and possess at the date of commencement of the Act or to which succession had opened before the commencement of the Act."

"The expression 'possessed by a female Hindu' in subsection(1) of section 14 cannot be interpreted as 'possessed at any time'. The expression 'Whether acquired before or after the commencement of the Act' which follows it should be interpreted, according to the context, as applying to the word 'property' and not the word 'possessed'. The plain meaning of the expression is that any property irrespective of the fact whether it had been acquired before or after the commencement of this Act which is in the possession of a Hindu female by her as full owner."⁵

Again, the Division Bench of the Orissa High Court consisting of Narasimhan C. J., and Das, J. in *Sri Laxmi Debi vs. Surendra Kumar Panda*⁶ made an exhaustive and thorough study of the effect of the Act, 1956. There the plaintiff had sued for declaration of her reversionary right in respect of the properties left by the last male holder. Delivering judgment Das, J. said, "The effect of the Hindu Succession Act is to confer absolute ownership of a female Hindu. i.e., the widows of the last male holder in respect of all properties left by a male Hindu which was in her or their possession at the date of the commencement of the Act, even though the husband or the male Hindu had died long before the commencement of the Act."

In the Patna High Court in *Ramsaroop vs. Hiralal*⁷ interpreting the term 'possessed' Misra, J. pointed out, "the word 'possessed' implies past possession as well as present possession. It may also imply future possession, in which event, no doubt, the better expression would be 'to be possessed.' But even the word 'possessed' may have the same meaning. As

the Legislature has used the expression 'any property possessed by a female Hindu' it is not to be confined to present possession."

His Lordship added that from the language used in the explanation to section 14 also, it follows that the Legislature did not lay stress upon the present possession of the property by a Hindu female, in which event alone she would be entitled to absolute ownership, but intended to terminate altogether the right of the reversioner subject to a restriction in sub-section(2). It is also to be borne in mind that the alienee from a Hindu female holding a limited estate owns the property as a guarantee from her and it is well settled that as between the guarantor and the guarantee their interests are conterminous. The guarantee holds the derivative title from the guarantor. The succession to the estate of the full owner from whom the Hindu female derives a limited right opens only after her death. The right of the alienee therefore cannot be construed to be an independent right. To construe the section to mean that as soon as the Hindu female has parted with her interest in such property, the alienee has an independent right without any reference to the interest of the limited owner, in which event alone section 14 would not govern such a case, would not be consistent with the principle applicable to the relationship between the guarantor and the guarantee.

A Full Bench of the same High Court in *Herak Singh vs. Kailash Singh*⁸ overruling the view taken in the case of *Ramsaroop v. Hiralal*⁹ held that section 14 only applies to properties 'possessed by' the female Hindu at the date of the commencement of the Act. It is not correct to say that the expression 'possessed by a female Hindu' refers to a point of time before the commencement of the Act, because such an interpretation would be inconsistent with the expression 'shall be held by her as full owner' occurring in the latter part of the section. It is true that section 14 is retrospective in so far as it enlarges a Hindu woman's limited estate into an absolute estate even with regard to property inherited or held by her as limited owner before the Act came into force. The section is retrospective only to this extent and no further. It is not correct to say that section 14 applies to properties of a female Hindu which she had inherited before the Act came into force and which she had absolutely alienated before the Act came

into force. The expression 'any property possessed by a female Hindu' occurring in section 14 must be broadly interpreted in the context of the language of the sub-section and must be taken simply to mean 'any property owned by a female Hindu' at the date of the commencement of the Act. But a female Hindu cannot be deemed to be owner of the property of which she had made an absolute alienation before the date of the commencement of the Act and section 14 cannot apply to such property and the limited interest of the widow in such property is not enlarged to an absolute interest.

Again, in *Rannsewak vs. Shcopujan*.¹⁰ The Patna High Court laid down that the word 'possessed' occurring in section 14(1) cannot be confined in its operation only to the possession of the Hindu female at the date of the commencement of the Act either on a grammatical view or even in view of the texture of the section itself. The word has been used in a broad sense and includes possession of the property which may not be in her actual possession but to which she may have a right in law to recover possession, such as her suit against a trespasser who has not perfected his title by adverse possession. 'Actual possession' is a term with an understood legal meaning and is that possession which exists where the thing is in the immediate occupancy of the party. The possession, therefore, of the mortgagee or of the lessee, who is a tenant, comes within the scope of the meaning of the phrase 'actual possession'. Similarly the possession of the licensee is also the possession of the licensor. Thus in a broad sense the term 'possession' is synonymous with 'ownership'.

Just because the words used in section 14(1) are "shall be held" it does not necessarily follow that merely on that account these words have no reference back to the past. It is well established that when the word 'shall' occurs in a statute, the intention of the Legislature is directed more towards its imperative character to show command, more than point towards its futurity. It is obvious, therefore, that although the words are 'shall be held' which *prima facie* may be of a prospective character, nevertheless, there are good reasons to give these words also a larger operation. A retrospective law may be further defined as one intended to affect transactions which occurred or rights which accrued, before it became operative,

and which ascribes to them effects not inherent in their nature, in the view of the law enforced at the time their occurrence. In this sense section 14(1) must be held to be retrospective in its operation.

In *Hanuman Prasad vs. Indrawati*¹¹ the Allahabad High Court laid down that the provisions of section 14 of the Hindu Succession Act are retrospective in some respects and prospective in others. They are retrospective to the extent that they governed the property acquired by a Hindu female even before the commencement of the Act; every property of a widow whether inherited before the commencement of the Act or after became her absolute property. But they are not retrospective to this extent that a property alienated by her before the commencement of the Act was deemed to have been owned by her absolutely. They do not have so much retrospective effect as to make her an absolute owner of the whole inheritance with effect from the date of the inheritance. They contain no provision affecting alienations made by her before the commencement of the Act; in other words, their validity and effect are left untouched. The provisions are prospective in the sense that the property becomes absolute property of the female only with effect from the commencement of the Act; the words 'shall be held by her as full owner' mean that she will hold it as a full owner since the commencement of the Act and not that she will be deemed to have held it as full owner with effect from the date of inheritance.

The High Court of Madhya Pradesh in the case of *Mt. Janyu v. Kisam*¹² held that to attract the provisions of section 14 for bettering the rights of a widow the property must have been possessed by the widow when the Act came into force. The words 'whether acquired before or after the commencement of this Act' qualify 'property' and make the section applicable to properties acquired before or after the commencement of the Act. They have no relation to the word 'possessed' because they qualify 'property' and not 'possessed.' The cardinal condition in the section is possession by the widow, which must be present before the section is applied to better her rights in the property. It is quite clear, therefore, that the widow who is not in possession but has parted with it before the act came into force cannot have the benefit of the section;

a fortiori any transferee by her before the commencement of the Act cannot be given the benefit of the provisions of section 14 either, because no such provisions exist.

The Supreme Court in *Kotturuswami vs. Veerava*¹³ observed that the word 'possessed' in section 14 is used in a broad sense and in the context means the state of owning or having in one's hand or power. Thus the opening words 'property possessed by a female Hindu' obviously mean that to come within the purview of the section the property must be in possession of the female concerned at the date of the commencement of the Act. That possession might have been either actual or constructive or in any form recognised by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word 'possession' in the widest connotation, when the Act came into force, the section would not apply.

Again, in *Mst. Bisarti v. Mst. Sukarti*¹⁴ Shrivastava, J. observed that the expression 'possessed by a female Hindu' occurring in section 14 of the Act obviously means that the widow must be in possession of the property in her right as a Hindu widow since possession must be a consequence of and related to the life estate which a Hindu widow has in her husband's property. It is only when such possession continues that the rights are enlarged under section 14 of the Act and she becomes full owner of the property. If she has already been divested of her interest as a widow on account of her remarriage before the commencement of the Act, her possession of the property is not in her right as a Hindu widow. The reversioners would, in such case, become entitled to the property immediately on her remarriage and the fact that they neglected to take action to dispossess her would not enlarge the rights of the widow.

From the above discussion it is concluded that the Supreme Court and the High Courts of Allahabad, Andhra Pradesh, Calcutta and Madhya Pradesh have taken a view which does not support the view expressed by the Patna High Court in the case of *Ramsaroop vs. Hiralal*.¹⁵ Indeed, the Patna High Court in the case of *Harak Singh v. Kailash Singh*¹⁶ overruled its

previous decisions and rightly pointed out that the object of the Act was to improve the legal status of Hindu women, enlarging their limited interest in property inherited or held by them in an absolute interest, provided they were in possession of the property when the Act came into force, and, therefore, in a position to take advantage of its beneficial provisions.

SUITS FOR REVERSIONARY RIGHTS

From the facts of the case, already mentioned, in *Laxmi Debi vs. Surendra Kumar*¹⁷ a question arises whether after the Hindu Succession Act, 1956, a suit by a full sister of last male holder for mere declaration of her reversionary right against widows of the last male holder in possession of his properties is maintainable. Das, J. observed, "The right of a reversioner as one of the heirs under section 42 of Specific Relief Act is limited to the question of preserving the estate of a limited owner for the benefit of the entire body of reversioners. But as against a full owner the reversioner has no such right at all."

"Under the Hindu Succession Act, 1956, the sister having been included in the second class of heirs has been completely excluded by the widow who comes in as heir in class I. And the widows would acquire the right of full ownership as to the effect of the deceased under the Act. It is, therefore, clear that when the property of the last holder is in possession of his widows, the sister of the last male holder has got neither any legal character, nor any interest in *praesenti* to be entitled to a mere declaration of her reversionary right."

A similar question was also discussed by a Division Bench of the Patna High Court consisting of Ramaswami J. and R. K. Prasad J. in *Ram Ajadhya Missir vs. Raghunath*.¹⁸ There the plaintiff claimed a declaration on the death of defendant No. 1 Mst. Parkolo, that he would be entitled as a reversioner to the property alienated by the mother of the first defendant Mst. Sureba Kuer to one Sitaram, father of defendants Nos. 2 and 3. The plaintiff's suit was decreed by the trial court. In appeal it was observed that the plaintiff's right as a reversioner was, in view of the change brought about by the Hindu Succession Act, lost. The court in that case assumed that the property in suit, which was in truth possessed by defendants Nos. 2 and 3, was held by Mst. Parkolo, and that since the enactment of

section 14 of the Hindu Succession Act the plaintiff had no interest in the property either of Mst. Parkolo or of Mst. Sureba Kuer. Their Lordships of the Patna High Court pointed out, "... As the law stands at present the plaintiff has interest in the property of Mst. Parkolo Kuer or Mst. Sureba Kuer. The plaintiff has no vested interest nor has he any *spes successionis* in the property which is the subject matter of the present litigation. Under the Hindu law as it stood before the Hindu Succession Act (Act 30 of 1956) every female who succeeded as an heir, whether to a male or to a female, took a limited estate in the property inherited by her. The heirs of the last full owner who would be entitled to succeed to the estate of such owner on the death of the widow or other limited heir, if they be then living were called 'reversioners'. The reason why such a suit (suit by a reversioner) was allowed, was that the suit was in a representative capacity and on behalf of all the reversioners and the object of the suit was that the corpus of the estate should pass unimpaired to those entitled to the reversion. But there had been a revolutionary change in law in this respect because of sections 14 and 15 of the Hindu Succession Act (Act 30 of 1956)."

"The effect of these sections is that the plaintiff in the present case is no more a reversioner and that the estate of Mst. Parkolo is not a limited estate but an absolute estate and that the plaintiff has no vested interest in the property nor has he a right of reversion or any kind of *spes successionis*. If it is the effect of section 14 and 15 of the statute it must be taken that the plaintiff has no right to bring a suit for a declaration that the sale deed executed by Mst. Sureba Kuer in favour of defendants 2 and 3 was a *farzi* or collusive document or that there was no legal necessity."

In giving decision in the above mentioned case the Patna High Court seems to have relied on the judgment of the Federal Court in *Lachmeshwar Prasad v. Kashwar Lal*.¹⁹ In that case the Chief Justice of India pointed out that the Federal Court, as a Court of Appeal, was entitled to take into consideration legislative changes which had supervened since the decision under appeal was given.

In the course of his judgment the Chief Justice of India cited with approval the following passage from the judg-

ment of the Supreme Court of the United States of America in *Patterson vs. State of Alabama*²⁰ : "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct the judgment under review but to make such disposition of the case, as justice requires. And in determining what justice does require, the court is bound to consider any change either in fact or in law which has supervened since the judgment was entered."

The principle laid down by the Patna High Court, it is submitted, is unsound and incorrect, because we hardly find anything in the language of the section 14 which abolishes the rights of the reversioners of the last male owner, where the estate of the limited owner is not enlarged. With respect we may further say that the Court did not attempt to interpret the language used in section 14 of the Hindu Succession Act.

In the case of *Herak Singh v. Kailash Singh*²¹ taking a different view from the above-mentioned cases the Patna High Court held that where a female Hindu makes an absolute alienation of property, without legal necessity, by way of sale or gift before the coming into force of the Act, the right of an heir of the last male holder to repudiate the alienation and his claim of possession thereof from the transferee on the death of the female Hindu, or on the extinction of the woman's estate otherwise, is not adversely affected and taken away by section 14.

In *Hanuman Prasad vs. Indrawati*²² the Allahabad High Court laid down that though an alienation made before the passing of the Act remains vulnerable and does not dispose of the preliminary disputes, the question still remains—who can impugnate and how? Now arises the real difficulty of the respondent. The widow continues to be estopped from challenging the validity on the ground of want of legal necessity and reversioners have completely disappeared by virtue of provisions of section 15. The customary law of succession has been completely abrogated by the Act which exhaustively amends and codifies the law relating to intestate successions among Hindus. Even the heirs of the husband referred to in section 15 are the heirs mentioned in section 8 and not the heirs under the customary law. The next reversioner, who was a creation of

the customary law, is no longer in the picture. It makes no difference whatsoever if by accident the heir of a widow is the same person who would have inherited the property on her death as next reversioner; if he inherits the property now, it will be in his capacity as the widow's heir and not as next reversioner. Since there will be no reversioner after passing the Act, nobody can get a decree as a reversioner now. Even these persons who could have obtained a decree before the passing of the Act that an alienation made before the passing of the Act was invalid cannot now get a declaration to that effect because they have lost the status by virtue of which they could get it. The heirs of the widow, who now replace the reversioners, also cannot challenge the alienation. In the first place, they claim through her and are estopped as much as she was. Secondly, they have not the same right as was possessed by the presumptive reversioners. The latter were the heirs to the estate left by the husband and were given the right to see that the estate left by him remained intact during the widow's life time and passed on to them. They are, therefore, allowed to sue for a declaration of the invalidity of an alienation even during the widow's lifetime. No such right can be claimed by the heirs of a widow who have no right whatsoever to inherit the estate left by her husband. The widow has been given unrestricted power of alienation and even otherwise they have no right to prevent her from alienating it for any purpose. The only right they possess now is to get whatever estate is left by her at her death. Now that there are no reversioners at all, there is no question of the alienation, howsoever illegal it might be, not being binding on the reversioners.

In *Ramchandra v. Sukhram*²³ the High Court of Bombay seems to have taken a view which is contrary to what is laid down by the Patna High Court in *Ram Ayadhya Missir vs. Ragunath Missir*²⁴ and *Mt. Janki Kuer vs. Chhathu Prasad*.²⁵ The facts in that case were: S. died on 10th February, 1944 leaving a widow, a son and a sister. Then the son died on December 3, 1944 and the property devolved on his mother (widow of S). On 23rd December, 1944 she gifted the property to the sister of S and on 8th June, 1945 she remarried. The uncle of S sued for possession of the property gifted by S's

widow on the ground that on her remarriage the property came to him by inheritance. The donee claimed that by reason of section 14 of the Hindu Succession Act if the property devolved by inheritance or otherwise upon a Hindu female before the commencement of the Act, her interest therein, if limited, sprang on the application of the Act into an absolute interest since the date of acquisition and the reversioners had no right to take the property even if the erstwhile limited interest is determined before the commencement of the Act.

J. C. Shah, J. said, "... by the retrospective operation given to section 14(1) the limited estate of a Hindu female is undoubtedly enlarged but only in property possessed by her at the date when the Act commences, and the section does not modify the rules relating to inheritance, nor does it extinguish the reversionary rights of heirs of the last full owner, when the estate of the limited owner is not enlarged. Again, there is nothing in the Act which extinguishes rights vested in interest in a person before the date on which the Act commenced."²⁶

In the Full Bench Case of *Mt. Lukai v. Narayan*²⁷ where the suit was brought for a declaration by the reversioners and a transfer made by the widow of land inherited by her from her husband, was not binding on them after her death, their Lordships of Madhya Pradesh High Court held, "While we admit that the limited owners under section 14 of the Act have been conferred all rights of ownership in respect of certain kinds of properties of which they are in possession at the date the Act came into force, and to that extent reversioner's rights are at an end, we do not think that in our cases the reversioners' interests have been wiped out by the enactment of section 14 of the Act The Act clearly enhances the rights of a female Hindu only in respect of the property possessed by her. It is a condition precedent to the application of section 14 that she must be possessed of the property. If she has parted with the property her rights cannot be enforced by the application of the section. Therefore, the passing of the Act during the pendency of the appeal in the suit of the reversioners for a declaration that the transfer by the Hindu female is not binding on them, does not affect the maintainability of their suit. As emphasis has to be laid on the words 'possess-

ed by a female Hindu' in the section the matter has to be judged not from the angle of the Hindu female and the property in her possession."

The view taken is the above-mentioned cases by the High Courts of Bombay and Madhya Pradesh seems to be quite correct and sound because we do not find any provision in the Act which has, as already mentioned, the effect of abolishing either expressly or by necessary implication the rights of reversioners in cases where succession had opened before the commencement of the Act. A reversionary heir under the Hindu law is a person who inherits as heir the property of the last full owner on the extinction of an intervening limited estate held by a Hindu woman. If by the Hindu Succession Act the estate of a Hindu woman in property not possessed by her is not regarded as enlarged into an absolute estate, it will be difficult to lay down that the right of the reversionary heir to the property of the last full owner on the determination of the limited estate is still abrogated.

RIGHTS OF AN ALIENEE AFTER THE COMMENCEMENT OF THE ACT

Now a question arises whether as alienee from a female who as a limited owner sold the property held by her without any legal necessity before coming into force of the Act, 1956, can claim higher rights after the commencement of this Act.

The subject was exhaustively dealt with in *Venkyamma vs. Veerayya*²⁸ where Viswanath Sastri, J. of the Andhra High Court pointed out, "The Act was not intended to benefit an alienee who, with his eyes open, purchased property from the female limited owner without any justifying necessity before the Act came into force and at a time when the female vendor had only the limited interest of a Hindu woman."

"It is only the transferor's interest that would pass to the transferee and a transferee cannot have a better title than what the transferor had. Section 14 merely enlarges her limited interest into an absolute estate in the property held by her when the Act came into force and does not enlarge the rights of a purchaser of a limited interest before the Act came into force. The rule of 'interest feeding the estoppel' enacted in section 43 of the Transfer of Property Act would not avail the vendees because the female vendor does not get an

absolute estate under section 14 of the Act in property of which she was in possession at the date when the Act came into force."

In the case of *Herak Singh v. Kailash Singh*²⁹ the Patna High Court has also held that the object of the Hindu Succession Act was to improve the legal status of Hindu women, enlarging their limited interest in property inherited or held by them to an absolute interest, provided that they were in possession of the property when the Act came into force, and, therefore, in a position to take advantage of its beneficent provisions. The Act was certainly not intended to benefit alienees or to unduly enrich the alienees who with their eyes open purchased the property from the limited owners without justifying necessity before the Act came into force and at a time when the vendors had only limited interest of Hindu women. The effect of section 14 is not to enlarge the alienee's interest into an absolute indefeasible interest.

To the same effect is a learned article³⁰ where it is stated. "In the case of an alienee from the female owner prior to the passing of the Act, his rights will fall to be measured under the General Hindu Law only. If the alienation was for legal necessity or benefit to the estate or if the alienee discharges the burden cast on him by 6 M.I.A. 393, P.C. in regard to enquiry by him, he is protected and takes absolutely. In other cases he can hold the property only for the duration of the limited estate of the transferor under the General Hindu law and the alienee cannot claim any higher rights by virtue of section 14."

We may conclude now that the Succession Act of 1956 has not altered the situation concerning the 'alienees' from a Hindu female in respect of their right over the property acquired by them before the commencement of the said Act.

Property which a Hindu woman may acquire after the commencement of the Act, by inheritance or device or in any way whatsoever, will be her absolute estate, subject always to the terms subject to which the acquisition was made.

Section 14 (2)—It is in the nature of an exception to the explanation to sub-section (1). It is apparent that the intention of the Legislature was to sweep away the limited character of a woman's rights over the estate possessed by her at one

stroke. That sub-section was made retrospective so as to include all property which she held at the time of the commencement of the Act, though it was acquired prior to its commencement. The all-embracing scope of the explanation is considerably cut down by the present sub-section.

The sub-section saves from the effects of the explanation property acquired by way of gift or under a will, a decree or order of a Civil Court or under an award or any other instrument and subject to a limited estate by virtue of the terms of such instruments. Such property shall not be held by her as full owner according to the first sub-section but shall be held by her, whether acquired before or after the commencement of the Act, on the terms of the alienation which transferred the property to her.

The sub-section does not apply where a female obtains the estate by inheritance. In that case the estate dissents not by a contract or agreement but operation of law. It is, thus, beyond any doubt that all women who 'possess' a widow's estate by inheritance either in the self-acquired property of their husbands under Hindu law or in the interest of a deceased co-parcener under the Hindu Women's Right to Property Act, 1937, have bestowed an absolute estate by the Act. On their death the property acquired by them by inheritance during their life-time shall be treated as their belongings to which the rules of succession laid down in sections 15 and 16 shall apply.

The explanation is made very broad by the addition of the clause 'acquired... in any other manner whatsoever'. The proper way of reading the explanation and sub-section (2) together is first to consider if the sub-section applies to a particular property. If it does not, the explanation comes into claim and the property must be treated as an absolute estate.

We may conclude that however defective the language may be, the Legislature has expressed its attention in unmistakable terms that a Hindu woman is now an absolute owner of everything which she 'possessed', at the time of the commencement of the Act, 1956, and shall be full owner of whatever she might acquire in whatsoever manner after the commencement of the Act subject to sub-section (2) of sec-

tion 14. It is perhaps needless to enlarge upon the obvious and further conclusion that though a Hindu female could formally relinquish her interest in the property inherited from her husband etc. prior to the Act of 1956, she cannot do the same now. In other words, surrenders are not possible after the commencement of the Hindu Succession Act, 1956, but there remains no reversion into whose hands the succession may be surrendered.

NOTES

¹ "That statute which declares what the Common Law is and ever has been." Wharton's Law Lexicon, 15th Ed. P. 307.

² 1956 Andhra W.R. 988 ; followed in Thailambal Ammal v. Kesavan Nair, A.I.R. (1957) Kerala 86.

³ A.I.R. (1957) Punj. 89, 90 ; see also Kamla Devi v. Bachulal Gupta, A.I.R. (1957) S.C. 434.

⁴ 1957, 61 C.W.N. 325, 327—328.

⁵ 1957, 61, C.W.N. 325, 328.

⁶ A.I.R. (1957) Orissa 1.

⁷ A.I.R. (1958) Pat. 319, 323.

⁸ A.I.R. (1958) Pat. 581 (F.B.)

⁹ A.I.R. (1958) Pat. 319, 323.

¹⁰ A.I.R. (1959) Pat. 75.

¹¹ A.I.R. (1958) All. 304.

¹² A.I.R. (1959) M.P. 1.

¹³ A.I.R. (1959) S.C. 577.

¹⁴ A.I.R. (1960) M.P. 156.

¹⁵ A.I.R. (1958) Pat. 319.

¹⁶ A.I.R. (1958) Pat. 581 (F.B.)

¹⁷ A.I.R. (1957) Orissa 1, 2—3. But see contra Sansir Patelin vs. Satyabati Naikani A.I.R. (1958) Orissa 75.

¹⁸ A.I.R. (1957) Pat. 480 ; followed in Mst. Janki Kuer vs. Chathur Prasad, A.I.R. (1957) Pat. 674; Dhirajkunwar vs. Lakhani Singh, A.I.R. (1957) MP 38.

¹⁹ A.I.R. (1949) F.C. 5.

²⁰ 1934, 293 U.S. 600, 607.

²¹ A.I.R. (1958) Patna 581, F.B. ; see also Rannsewak vs. Sheopujan, A.I.R. (1959) Pat. 75.

²² A.I.R. (1958) All. 304.

²³ 1950 '60 Bom. L.R. 82.

²⁴ A.I.R. (1957) Pat. 480.

²⁵ A.I.R. (1957) Pat. 674.

²⁶ 60 Bom. L.R. 82, 86, see also Sitabhai vs. Kathulal, A.I.R. (1959) Bom. 78.

²⁷ A.I.R. (1958) M.P. 160, F.B. ; followed in Mt. Janku vs. Kisam, A.I.R. (1959) M.P. 1.

²⁸ 1956, Andh. W.R. 988 ; followed in 1957 1 Andh. W.R. 258.

²⁹ A.I.R. (1958) Pat. 581, F.B. ; see also *Mt. Janku vs. Kisam*, A.I.R. (1959) M.P. 1 ; *Kotturuswami v. Veeravva*, A.I.R. (1959) S.C. 577.

³⁰ "The Hindu Succession Act, 1956 ; A Study", published in 1956, 2 M.L.J. (Journal), 59, 66.

CHAPTER VII

CONCLUSION

Summing up we may say that among the *Smṛiti* writers Katyayana and Narada are to be considered mainly responsible for the limitations imposed upon the widow's right to use her inherited property. In other words, the sources of the women's limited estate owe their origin to the texts of Katyayana and Narada. All the commentators except the author of the *Mitakshara* have advocated the qualified rights of a widow in respect of the inherited estate. But Vijnaneshwara, the author of the *Mitakshara*, supporting his theory by the text of Yajñavalkya favoured women's possessing an absolute interest in the property which they obtain by inheritance or partition.

Proceeding to the judicial decisions one may notice that a female Hindu was not full owner of the property inherited by her. This limited ownership was known as the Hindu woman's estate.¹ Even the Hindu Women's Right to Property Act, 1937, granted a widow a 'women's estate' and not an absolute ownership in respect of the property inherited by her. But an estate which devolved on her as an heir as a daughter of the family (i.e. granddaughter, sister, father's sister and niece etc.) will in Bombay be an absolute estate.

The Hindu female possessed the power to alienate property held by her as limited owner but the alienation was only binding on the reversionary heir, if (i) it was for legal necessity or benefit of the estate or (ii) the alienee proved a reasonable sufficient and *bona fide* enquiry on his part as to the existence of justification or (iii) with the consent of the next reversionary heirs. Besides if the widow transferred (so to speak) the property inherited by her by way of surrender to the nearest reversionary heir, other reversioners would be bound by it. In order that the reversioner may acquire good title by surrender, there must be a 'self-effacement' of the widow. In other words there must be something in the nature of a civil death of the widow, the extinction of her

right in her deceased husband's estate, a circumstance which would happen if she died. It is in this view that the doctrine of surrender is supported under the Hindu law. The surrender must be a *bona fide* surrender and not a device to divide the estate between the widow and the reversionary heirs. This is a requirement that produces difficult problems in particular cases. No surrender, however, is binding on her subsequently adopted son, for the reasons already described, since her adoption perpetuates the line of the person (i.e. father) from whom, it is assumed, the property was inherited by the widow as provisional heir.

If a Hindu widow wastes the corpus of property acquired by her by way of inheritance from her deceased husband, the reversioner has sufficient powers to take anticipatory steps to inhibit further waste.

The Hindu Succession Act puts women on a par with men in respect of enjoyment of property possessed by her. She is now as much an owner of her property as is a man of his property. Neither will the Hindu woman suffer any proprietary disability merely by reason of her gender, nor will her power of alienation of property be fettered by any rule or custom. The only restriction which can exist in regard to her proprietary rights will not be due to any rule of law but because the giver of the property may want to give it to her subject to limitations. As by virtue of section 14 of the Hindu Succession Act, 1956, the widow becomes full owner of the property inherited from her husband, she cannot surrender that property in favour of her husband's reversionary heirs, though she may alienate it by gift or otherwise like any other full owner.

It is rather difficult to appreciate the view adopted by the framers of the Act. There is a consensus of legal opinion throughout the country that the Mitakshara system of the joint family, its rule of survivorship and right by birth, do not suit modern social needs and the requirements of Hindu society. In spite of this Parliament has considered it suitable to retain the Mitakshara system *sub modo*. By retaining the Mitakshara system the Hindu Succession Act has given rise to various questions, for instance, firstly, can the managing member of the Hindu joint family now dispose of a widow's

interest in view of section 14 of the new Act? Apparently not. Secondly, what sort of coparcenary now exists wherein the widow of the deceased coparcener can dispose of her interest absolutely and other coparcener cannot except for justified purposes? Thirdly, when a widow mother succeeds to her son's coparcenary interest, and he, as coparcener or reversioner, was entitled to dispute alienations by another coparcener's widow under the Act of 1937 or otherwise, can she be her own reversioner? These and other problems which are likely to arise are presented by the Act.

The Hindu Succession Act has codified the law of intestate succession among Hindus, making many desirable changes in the pre-existing succession laws governing Hindus. But in many provisions of the enactment the repercussions on other branches of Hindu law are lost sight of. Under the *Mitakshara* system ancestral property will spring into existence when the self-acquired property of a male is inherited by his sons, so as to confer a right by birth upon the son's male issue. This will enable the grandson to claim a partition of his share from the property inherited by the son. By explanation to section 14 of the Hindu Succession Act, 1956, property inherited by a daughter is taken by her absolutely and thus is not answerable for any such claim by her own issues. This will act to the prejudice of the male heirs in Class I of the Schedule to the enactment. Comparable instances of possible ambiguity in this statute include that while under the general Hindu law a subsequently born *aurasa* son is entitled to a greater share than the adopted son in case of competitive succession, the Act is not clear whether the privilege is abolished and the Hindu Adoption and Maintenance Act, 1956, appears to leave much unsettled.

Undoubtedly the Act makes no distinction between the son and the daughter in matter of right to inherit, yet it has resulted in perhaps unforeseen alterations in the positions of the daughter. Before the passing of the Act, when a man died intestate leaving a widow and a daughter, a widow got a life interest in the property and the daughter would succeed to his estate on the death of the widow. Now under the Hindu Succession Act, 1956, both the widow and the daughter would succeed to his estate and each would take half a share. But

section 14 provides that any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner. The female Hindu thus acquires an absolute interest in the property possessed by her and the widow has the power to give or sell the property to whomsoever she likes. The natural tendency of a widow would be to defeat the interest of her step-daughter by gifting the entire estate of the deceased in favour of her own brother or sister.

Developments of this character must be awaited. No doubt Parliament will react to them in time. In the meanwhile it is hoped that this discussion of the Hindu woman's estate will clarify the state of the law which still applies to many transactions and which Parliament, it seems, aimed to abandon in June, 1956.

NOTE

¹ It was, doubtless, per incuriam *Changla C.J. in Dagdu Balu vs. Namdeo*, 156 Bom. I.L.R. 513 said that "Hindu woman's Estate" was unknown whereas "Hindu Widow's Estate" was to correct expression.

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